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Cert Ed (UZ), Dip Sp Ed (UZ), MagAd Cert (JC), LLB Hons (MSU),
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PREFACE

The legal system of Zimbabwe encompasses what may be described as the type of legal processes that apply to this country or jurisdiction. It includes the sources of law, the law making process and their application.

The legal system of Zimbabwe has undergone some transformation since the attainment of independence in 1980. Of great interest is the label placed on the legal system. Roman Dutch Law has been applied in this country from a historical background. When the whites occupied Zimbabwe in 1890 they introduced the system which was applied from their base at the Cape of Goodhope, South Africa. This adoption was contained in the previous Constitutions before attaining independence. The Lancaster House drawn Constitution which was repealed in 2013 also adopted that provision in Section 89 as follows;

> *"Subject to the provisions of any law for the time being in force in Zimbabwe relating to the application of African Customary Law, the law to be administered by the Supreme Court, the High Court and by any courts in Zimbabwe subordinate to the High Court shall be the law in force in the colony of the Cape of Good Hope on 10th June 1891 as modified by subsequent legislation having in Zimbabwe the force of law."*

From this background we notice that although the white colonisers introduced their imported law, they made provision for African Customary Law. The current Constitution which came into effect in 2013 provides for the law to be administered in Zimbabwe in Section 192. It provides that the law to be administered by the courts of Zimbabwe is the law that was in force on the effective date, as subsequently modified. This implies that the dual legal system enshrined in all prior constitutions still prevail in this country

Once again the dual legal system which still haunts us and sometimes creates conflict of laws is a clear result of the historical developments in this country. When the white settlers defeated Lobengula's feudal state and the Shonas in the first Chimurenga wars, they did not have enough resources to eradicate and completely overhaul the African legal system. In order to preserve

tranquillity and peace they let the Africans handle their private disputes using their customs. It can therefore be said the private law of Africans was to be governed by customary law. On the other hand, to maintain law and order in the state the whites used their criminal and constitutional law (public law) to control the Africans. They did this in order to control the defeated Africans and the state machinery was used to enforce the law.

The whites were governed by general law (that is, all other law which is not customary law) and for the system to function properly, separate courts were established. Customary law was applied in the Chief's Courts and the District Commissioners' Courts. General Law was applied in the Magistrates' Courts and the High Court. After independence, the Chiefs Courts were replaced by Primary Courts introduced by the Customary Law and Primary Courts Act Number 6 of 1981. This has since been replaced by the Customary Law and Local Courts Act [Chapter 7:05] which came into force on 12 February, 1992.

The current position is that the Local Courts, which are presided over by Headmen and Chiefs, apply Customary Law. The Magistrates Courts apply both customary and general law and they operate with separate sections. Section 11 (I) of the Magistrates' Court Act [Chapter 7:10] provided in part;

> "*Every court (Magistrates')shall have in all civil cases, whether determined by general law of Zimbabwe or by customary law the following jurisdiction….*"

The High Court which has unlimited jurisdiction in civil cases can determine cases using both general and customary law. The Supreme Court which is an appeal court necessarily deals with appeals relating to both systems of law. Section 3 of the Customary Law and Local Courts Act which became operational on 1st November 1997 provides for the choice of law to be applied in disputes. It provides that parties to a dispute can elect whether they want their case to be decided according to customary law or general law. Debate is still, however, ongoing on the conflicts between customary law and general law.

This text is only a guide dealing with introductory concepts of the Legal System of Zimbabwe. It is not exhaustive or an end to itself. It is however a starting point to those who want to understand and appreciate the basic

Zimbabwean legal system. It is envisaged that it will assist law students, the police, legal practitioners, prosecutors, magistrates and the general public and members of other professions who seek insight knowledge on our legal system.

Vakayi Douglas Chikwekwe

CHAPTER 1

Introduction to law

1. JURISDICTION

1.1 A Legal System

A legal system refers to a procedure or process for interpreting and enforcing the law. It elaborates rights and responsibilities of the state and its citizens in a variety of ways. A lay or ordinary person might well regard a legal system as including everything to do with the law and its application from the police to courts and the prisons. This is an understandable view by a lay person in view of the fact that most people have little to do with lawyers and the law. The lay person has therefore a tendency to regard the legal system as simply the machinery used to deal with "criminals."

From a legal practitioner's perspective, the expression, "Legal System" has a different meaning. It means the system by which laws are made, amended and applied.[1] It therefore includes those bodies which are possessed with the power to make law and those that are responsible for its application.

1.2 The meaning of law

Thurman W,A[2] observed:-

> *"Obviously, law can never be defined. With equal obviousness, however, it should be said the adherents of the legal institution must never give up the struggle to define law, because it is an essential part of the ideal that it is rational and capable of definition….*

[1] Bodenheimer, E (1962) ***Jurisprudence: The Philosophy and Methods of Law*** Mass Cambridge pages 162 -164

[2] Thurman W, A (1935) ***The Symbols of Government*** Yale University Press Howen page 199

> *Hence the verbal expenditure necessary in the upkeep of the ideal of "law" is colossal and never ending.*
> *The legal scientist is compelled by the climate of opinion in which he finds himself*".

As apparent from the above the definition of law is subject to great controversy. A whole subject mainly dedicated to defining the law exists. This subject is called 'jurisprudence. It is a term derived from Latin ***'jurisprudencia'*** meaning knowledge of the law. Several schools of thought have emerged. These schools of thought ponder on what the law is. Each has made an attempt to come up with a definition of the law.

An example of the earliest school of thought is collectively known as the Natural Law School. This school of thought propoundsthat there are objective moral principles which depend upon nature of the universe and which can be discovered by reason.[3]

Natural lawyers typically claim that there is a higher set of external and universal norms which has not been created by human beings but which exists in nature. All states and law makers are subjects to this set of norm. Natural law thinkers differ among themselves on the nature and source of this higher set of norms.[4] Some ascribe religious or supernatural origins to these norms. This is the case with Christian and Muslim philosophers like Augustine (Fourth Century A.D.), IbnRushd (Twelfth Century A.D.) and Thomas Aquinas (Thirteen Century A.D.)[5]

The best representative of the Natural Law School thinking is the Roman Orator, Cicero. In his essay "***De Re Publica***" he points out that,

> *"True law is right reason in agreement with nature. It is a sin to try and alter this law, nor is it allowable to attempt to repeal any part of it, and it is impossible to abolish it entirely. We cannot be freed from its obligations by senate or people….And there will notbe different laws at Rome and Athens, or different*

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[3] Curzon, L.B. (1989) ***Dictionary of Law*** Pitman Publishing – London page 206
See also Roscoe P (1930) Interpretation of Legal History Cambridge University Press Cambridge page 133

[4] Jones, J.W (1940) ***Historical Introduction to the Theory of Law*** London pages 98 - 138

[5] Dennis, L. (1965) ***Introduction to Jurisprudence*** Second Edition Stevens London pages 1 - 5

> *laws now and in the future, but an eternal and unchangeable law will be valid for all nations and all times, and there will be one master and rules, that is, God over all, for he is the author of this law, its promulgator, and its enforcing judge."*[6]

On the other hand the Positivist School of thought sees law as an assemblage of rules or commands made by a sovereign power to control the subjects. Legal positivism rejects all notions of a higher, natural law. According to this theory it is not possible to conceive a law of nature if command is the essence of law.The positivist are quite certain on this. Only what the state decrees or accepts is law.[7]

The law is portrayed as rational, coherent, necessary and just by Liberal legal Scholars. On the other hand the Critical Legal Scholars regard law as arbitrary, contingent, unnecessary and profoundly unjust. This constitutes what is embedded in western legal and political thought, the rule of law.[8]

A number of legal scholars have attempted to define law. Sir William Blackstone[9] in his Commentaries on the Law of England said;

> *"Law, in its most general and comprehensive sense signifies a rule of action, and it is applied indiscriminately to all kinds of action, whether animate or inanimate, rational or irrational."*

Salmond, J,[10] (1996) one of the eminent jurists of all time said,

> *"In its widest sense the term law includes any rule of action; that is to say any standard or pattern to which actions (whether acts or rational agents or the operations of nature) are or ought to be conformed."*

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[6] Kahn, E.***Cicero and the law of Nature***: "***de Re Publica***" The South African Law Journal Volume 103 part 1 February 1986 page 50

[7] Madhuku, L. (2010) ***An Introduction to Zimbabwean Law*** Weaver Press Harare pages 2-3

[8] Du Plessis, L.M (1992) ***An Introduction to Law***Juta and Company Wetton

[9] Blackstone, W ***Commentaries in the Laws of England*** 1876 Edition by Kerr, R.M, 4 Vols. London page 21

[10] Fitzgeralid, P.J (ed) (1957) ***Salmond on Jurisprudence*** Eleventh Edition Sweet and Maxwell London page 6.

Lord Chancellor Sankey[11] while paying tribute to the Law of England had this to say;

> *"Amid the cross – currents and shifting sands of public life the law is like a great rock upon which a man may set his feet and be safe, while the inevitable inequalities of private life are not so dangerous in a country where every citizen knows that in the law courts, at any rate, he can get justice."*

According to Curzon[12] law is the written and unwritten body of rules largely derived from custom and enactment which are recognized as binding among those persons who constitute a community or state, so that they will be imposed upon and enforce among those persons by appropriate sanctions.

Law is defined by Bind, R[13]as the ultimate rules which bind men together in society. Coercion is a weapon of the law but is not the basis of that law. It is an obligatory rule of conduct. The commands of thelaw have coercive power.[14] It follows that a law is a rule of conduct imposed and enforced by the sovereign state. This implies that law is the body of recognized rules applied by the state in the administration of justice.[15] Not all rules however are rules of law. There are other rules which govern human conduct such as moral rules, religious directives and institutional rules.[16]

In the simplest term law is defined as rules that govern or regulate the behaviour of man.[17] It shall therefore suffice to use the following simple definitions of law.

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[11] Lord Chancellor Sankey ***Golden Thread Speech***while paying tribute to the Law of England Routledge London
[12] Curzon ***op cit***note 3 page 67
[13] Bind, R. (ed) (1983) ***Osborn's Concise Law Dictionary*** Seventh Edition Sweet and Maxwell London.
[14] Hobbes, T. (1651)Leviathan (ed CB Macpherson 1968)
[15] Harris, P. (2002) ***An introduction to Law*** Fifth Edition London Butterworths pages 2-4
[16] Kahn ***op cit*** note 6 page 53
[17] Kahn ***op cit***note 6 page 23

(i) Law is a set of the rules that govern or regulate the behaviour of man.

(ii) Law is the body of rules which a state or community recognizes as binding on its subjects or members and which determines those people's rights and duties.[18]

Only law in the strict sense is enforced by courts of law or some other organs of the state. The feature common to law is the principle of order and regularity.[19]

1.3 The Purpose and Function of Law

Introduction

The law has two main functions which are to preserve order and to maintain justice with the interest of the individual balanced against the interest of the community. In considering how the law maintains justice it is necessary to ask; what is justice?

According to Reynolds;

> *"Justice is what appears to be right and fair to a fair-minded man".*[20]

In a legal context this "fair minded man" is generally known as the "reasonable man". The law achieves its objective of doing justice by treating all people equally. To be accepted, it must conform to the prevailing perception of justice.

[18] Blackstone ***op cit***note 9 page 21
[19] Lord Justice Denning ***The Need for a New Equity*** (1952) 5 Current Legal Problems 1 at 9
[20] Reynolds, D.A (1983) ***An Introduction to Law***Ministry of Justice Harare

1.3.1 Maintain Peace and Order

According to Hahlo, H.R. and Kahn, E.[21] the first and foremost purpose of law is to maintain peace and order in the community. Man lives in a society full of other human beings. It is the hope of every man living in such a society to achieve full development. Society, however, cannot exist without law as stated by Robert L. Calhoun.[22] Without rules by conduct there cannot be order. Without order there cannot be peace and progress. It follows that without law there is either strife or the enslavement of the spirit of man. As a result civilization can only survive when based on law and order as observed by Hahlo and Kahn[23].

Maintaining peace and order as a function of law was covered by the notion popularized by an English Philosopher, John Locke who pioneered the social contract theory. In the seventeenth century, the scholar was the first to suggest that natural law consisted of inalienablehuman rights to life, liberty and property.[24] Locke's theory was based on another earlier scholar De Groot's idea of a social contract between the state and its citizens. He noted that the only function of the state is to protect the basic human rights of every citizen. If the state fails to do so itself or violates these rights, it may legitimately be overthrown. Locke therefore developed the theory that the state's power is limited and laid the theoretical foundations of constitutional democracy.[25]

John Locke's theory went further to assert that human beings at a particular stage entered into a contract whereby each would give up part of their natural liberties in return for peace and order. This was found to be the best avenue for man's enjoyment of liberty. Law is therefore viewed as an agreed mode of preserving natural liberty through peace, stability, tranquility and order. It follows that no man should take the law into his own hands.[26]

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[21] Hahlo, H.R. and Kahn, E. (1968) ***The South African Legal System and its Background*** Juta and Company Cape Town page 26

[22] Calhoun, R.L (1960) ***Democracy and Natural Law***: Natural Law Forum (note Dame Law School) 31 at 50

[23] Hahlo and Kahn***Op cit*** note 21 page 26

[24] Roederer, C. and Moellendorf, O(2007) ***Jurisprudence*** Juta and Company Ltd Lansdowne pages 43-45

[25] Locke, J. (1634 - 1704) ***Treatises of Government*** . (edP Laslett, 1988) pages 1 - 5

[26] Hosten W.J. et al (1995) ***Introduction to South African Law and Legal Theory***. Second Edition Durban Butterworths page 247

In order to preserve law and order public institutions such as law courts must regulate and resolve disputes arising among members of society. This function has however been abused in certain societies where peace and order have been used to undermine individual authority and liberty. It is not in dispute that most despots and infamous dictators of the world claim to be utilizing law for the sake of preserving peace and order. These governments use the law to maintain a tight grip on their subjects in society.

It has been argued that one of the key functions of law is to preserve the moral fabric of society. It converts moral rules into legal rules thereby giving the support to the state in preserving morality. This function is generally accepted, except that it raises insurmountable problems as to which moral rules to enforce.[27] Some scholars have argued that it is not the business of law to enforce morality because it amounts to bringing law into the private domain. This would result in interference with people's private lives. However, the main thrust of moral law aims at the perfection of character and the doing of 'good' as a value in itself. The world is usually divided in regard to which moral rules should be subject to legal enforcement.

The approach to the moral issues is dynamic. It is different in parts of the world. It also changes from time to time in respect of civilization in most parts of the world. It was once a crime to commit adultery. Today, in this country, though adultery still has consequences in civil law, such as granting an action for divorce and damages; it is no longer a punishable offence. This signifies a shift in the moral fabric of a society. One would argue that law should not interfere with the personal autonomy of individuals. However, the same scenario would not prevail in societies which adhere to strict Islamic Sharia Law. If convicted, adultery would normally attract a death penalty by stoning in public.

The locus classicus in Zimbabwe on legal morality is the case of ***S v Banana.***[28] The accused, a church reverend and former President of the Republic of Zimbabwe who was charged with sodomy petitioned the supreme court. He argued that by being charged with the crime of sodomy

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[27] Burchell, J. and Milton, J. (1994) ***Principles of Criminal Law.*** Juta and Company Wetton pages 39 – 41
See also ***RH v DE*** (594/2013) [2014] ZASCA 133

[28] ***S v Banana*** 2000 (1) ZLR 607 (S) 608 C - H

he was being discriminated against on the ground of sex in that a similar act, between two consenting adults, one of which is a woman is not criminalized.

He therefore argued that his rights as enshrined in the bill ofrights under Section 23 of the Lancaster drawn Constitution hadbeen violated. As a result he argued that Section 23 of the Lancaster House drawn Constitution had been breached.[29]

The petitioner's argument was rejected by three of the five Supreme Courtjudges of appeal constituting a constitutional court. The majority of the judges concurred that it was proper discrimination. Gubbay CJ and Ebrahim JA (as they then were) dissented by holding that it was unacceptable that the law should enter this terrain. This decision would usually not hold in certain western countries where sodomy by consenting adults is not an issue. Homosexuality and same sex marriages have been accepted in certain western societies. The majority in Zimbabwe regard that as an immoral act or conduct.

Great scholars such as Karl Marx see law as an instrument of the ruling class. According to the Marxist theory law is there to protect the interests of the ruling class. The ruling class is economically dominant and owns the means of production. It therefore uses law to protect its interests and oppress the poor.[30] This normally prevails in capitalist societies and there is no such thing as justice to the common man according to the theory. There is only justice for the rich and ruling party. The Marxist theory has been challenged for being exaggerative of the roles of class. Although there is substance in the Marxist theory, one should not lose sight of the fact that no legal rules can be used to serve the interest of the rich or ruling party only.[31]

Law is a vehicle of change. One of the main purposes and functions of law is to change certain established norms and procedures. It has been used to change the position of women in society by the introduction of

[29] Section 23 of the Lancaster House Drawn Constitution- This Constitution was repealed and substituted by the Constitution of Zimbabwe of 2013 Amendment (No. 20)
[30] Madhuku ***op cit*** note 7 page 10
[31] Ibid

Maintenance Act[Chapter 5:07] the Matrimonial Causes Act[Chapter 5:13] and the Legal Age of Majority Act (LAMA) now Section 15 of the General Laws Amendment Act.[32] It has enhanced the position of women by allowing them to be appointed as executors of their late husbands' estates thereby conferring them with the right to inherit from the estates of their late husbands.

1.4 Justice

One great English Judge, Lord Wright[33], once wrote that he was'

> *"Most firmly convicted by all his experience and study of and reflectionupon law, that its primary purpose is the quest of justice".*

MilneJ.P. in ***S v Ismail***,[34] said;

> *"Justice is a distinctively human concept and does not belong to the animal world. All men by their nature are lovers of justice. It is because injustice is intolerable that humanity, over the centuries, has developed systems of law designed to secure that there will be, as far as possible, justice between man and man and between man and the community to which he belongs."*

It has been argued by Cohem M.[35] that justice is not only the ideal to which law ought to conform if it is to be good law. However, it is the chief instrument through which law fulfills its purpose of maintaining peace and order in the community. He further argued that the close a legal system comes to being 'just', the more willing it will be obeyed. On the other hand, an unjust system of law can only be enforced by strong tyrannical sanctions. In the long run rebellion will break out. This

[32] The Legal Age of Majority Act now Section 15 of the General Laws Amendment Act[Chapter 8:02].
[33] Lord Wright ***Legal Essays and Addresses:*** The Modern Law Review Vol. 4, No. 1 (July 1940) pages 69-72
[34] ***S v Ismail*** 1965 (2) SA 446 (N) 459
[35] Cohen, M. (1926) ***Jus NaturaleRedivivum*** 25. Philosophical Review page 761, page 98

usually result in the breakdown and upsetting of the established order; Garlan E.W.[36] noted that;

> *"The body of law could not mention itself if it did not conform in large measure to the prevailing sense of justice".*

Occasionally legal scholars, the legislature and the judiciary invoke the concept of justice. Most theories of law do not directly address the concept of justice. For centuries, many legal scholars, philosophers and jurists have tried in vain to answer the question; "what is justice?" The statements in Justinian's 'Institutes' are that;

> *"Justice is the set and constant purpose which gives every man his dues."*[37]

This has been subject to criticism in that it involves further questions as to what Man's dues are? It however means that there shall be equality of treatment for those in like circumstances.

Aristotle, cited by Kelsen, H[38], said that;

> *"Injustice arises when equals are treated unequally and also when unequals are treated equally".*

Most theories of law assume that the concept of justice can be understood under the Natural Law Theory. Under this theory any law which is unjust is either not law or is morally wrong. In the heart of every man, as all philosophers will say, there is a natural sense of justice and a natural sense of what is right and proper. The law follows natural law and when it departs from this there is something usually wrong with it. The rules of procedure particularly are designed to see that what is naturally right

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[36] Garlan, E.N (1941) ***Legal Realism and Justice*** Columbia University Press New York page 98

[37] Wessels, J. (1908) ***History of the Roman Dutch Law*** Grahamstown African Book Company Cape Colony pages 14-16

[38] See Kelsen, H. (1945) ***General Theory of Law and State*** The LawBook Exchange Ltd page 13

and just is given effect to. A miscarriage of justice may take place where this rule is applied rigidly.

The Natural Law theorists do not say what constitutes justice but it can be inferred that justice under natural law exists if the law reflects the natural order of things. What then is Natural order of things, one would ask? This is answered by saying that the natural order of things may be ascertained through reflective reasoning. As a result the Natural Law theory is sometimes criticized for being unhelpful in seeking and understanding the concept of justice.

Under the Positivist School of thought, justice is not an issue because this theory is concerned with what the law is and not what is ought to be. However, some positivists have made comments on the concept of justice.[39] The most prominent positivist to do so is Bentham through his utilitarian concept. It is Bentham's submission that justice exists when there is greatest happiness for the greatest numbers. This theory has however been attacked for lacking value. This is so because happiness is impossible to measure.[40]

Hart also discussed about the minimum content of morality in any law as an ingredient of justice.[41] Other theorists such as sociological jurists seem to share the view that justice exists when law responds to societal interests that are identified by the legal framework. When the law becomes anti-social and repressive it ceases to be just. It becomes morally and socially unacceptable.[42]

According to the Marxist Theory there can be no justice as long as class divisions exist.[43] Further, justice will only arise when classes have disappeared and the means of production are enjoyed by everyone. There is only one class of justice, being justice for the bourgeoisie under capitalism. In other words this implies that there is no justice for the poor but justice to protect the rich under capitalism.[44]

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[39] Madhuku***op cit*** note 7 page 2 Kitchener 2000) pages 2 – 6 Hahlo and Kahn ***op cit*** note 21 pages 30 - 31

[40] Buckland, W.W. (1945) ***Some Reflections of Jurisprudence*** Cambridge Press Cambridge page 118 also Bentham, J. (1781) ***An Introduction to the Principles of Morals and Legislation*** (Batoche Books

[41] Hart, H.L. (1992) ***The Concept of Law***. Revised Edition Oxford University Press Oxford pages 2 - 3

[42] Hart, H.L.A. ***Positivism and the Separation of Law and Morals*** (1958) 71 Harvard LR pages 593 and 601

[43] Madhuku***op cit*** note 7page 10

[44] Ibid

John Rawls devised his own theory of justice. He argued that justice is fairness. To construct his theory he relied on a devise which he called the *"original actors placedbehind a veil of ignorance*".[45] He usedthis to create a hypothetical situation in which bias is absent. As a result all men are equal in the eyesof the law. There is no bias before the law.

Voet, cited in Hahlo and Kahn[46] said,

> *"The law ought to be just and reasonable, both in regard to the subject matter, directing what is honorable, forbidding what is base; and as to its form, preserving equally and binding the citizens equally."*

Members of the society must be assured of fair process in disputes resolution with other individuals whom they interact with. Such law must be based on reasonand logic. It should therefore be interpreted byjudicial officers within our courts. If it fails to meet out with equal justice to all men, then it ceases to be reasonable and just.

What is just for one individual may not be just for the other. However, what is accepted by all legal systems is that the law must serve the ends of justice as its main function. As noted by Hahlo and Kahn[47]a legal system must comply with the postulates of generality, reasonableness, equality and certainty. It is to achieve its ends of order and formal justice.

In our context;

> *"Justice is what appears to be right and fair to a fair-minded man".*[48]

[45] Rawls, J. (1972) ***A Theory of Justice*** Clarendon Press Oxford page XV pages 3-4
[46] Hahlo and Kahn ***op cit*** note 21 page 26
[47] Ibid
[48] Reynolds, ***op cit*** note 20
See also Rawls, J (1971) ***A Theory of Justice*** The Belknap Press of Havard University Press Havard

Justice can be defined also as;

> *"A concept of moral rightness based on ethics, rationality, equitableness and law".*[49]

Justice must not only be done but seen to be done. It should be open and accessible to the people. Public confidence should therefore be maintained by an impartial judiciary. The principle of impartiality is therefore essential to the proper discharge of the judicial office.

It appears not only to the making of a decision itself but also to the process by which the decision is made. To achieve this, judicial officersmustperform or execute their duties without favour, bias or prejudice. Justice is therefore what a reasonable man perceives as right and fair.

1.5 The reasonable man

In a legal context the "reasonable man" is generally known as the "fair-minded man".[50] He is an ordinary, prudent and diligent person who normally exercises due care and caution while avoiding any extremes in his conduct. A "reasonable man" is a fictional person normally used as the yardstick or standard upon which the conduct of others are measured against. He is like an ordinary person on a bus to his residential area. He is the ***diligent –paterfamilias***.

A reasonable man or the ***diligen*t** or ***bonus paterfamilias*** can be found in many spheres. A negligent driver can be measured against a reasonable driver in similar circumstances with similar skills and experience. The negligence of a medical practitioner can be measured against the conduct of a reasonable medical practitioner with similar experience and expertise in similar circumstances.

Feltoe, G.[51] submits that;

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[49] West's ***Encyclopedia of American Law*** Second Edition The Gale Group Inc 2008
[50] ***Deligens Paterfamilias,*** (1992) The Reader's Digest Association South Africa (Pvt) Ltd Cape Town pages 1 - 6
[51] Feltoe, G (2004) ***A Guide To The Criminal Law of Zimbabwe*** Legal Resources Foundation Harare page 12

> *"The reasonable man ……..is.……..……..……..……..……..……..……..…in effect the embodiment of societal norms of behavior. The reasonable man standard is a uniform standard and takes no account of the race, idiosyncrasies, superstitions, beliefs or level of intelligence of the accused."*

Holmes JA in ***S v Burger***[52] described the reasonable person criterion in the following terms;

> *"One does not expect of a diligent paterfamilias any extremes such as Solomonicwisdom, prophetic foresight, chameleonic caution, headlong haste, nervous timidity, or the trained reflexes of a racing car driver. In short, a diligent paterfamilias treads life's pathway with moderation and prudent common sense."*

As already noted, the reasonable man is like that ordinary man walking in the street or riding on a bus tohis home. It is, however important to note that there are also basic rights and principles of justice, which are absolute and do not need interpretation by a reasonable man. The law achieves its objectives of doing justice by treating all people equally. To be accepted it must conform to the prevailing perception of justice.

1.6 The application of law

The law is there to protect the lives of individuals and balance them against the interests of society as a whole. So important is this objective that it is enshrined in the newConstitution.[53] It is enshrined as one of the fundamental rights and freedoms guaranteed in the Bill of Rights. The Constitution of Zimbabwe states that;

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[52] ***S v Burger*** 1975 (4) SA 877 at 879 D - E

[53] Hahlo and Kahn ***op cit*** note 21 page 4 Section 192 of the Constitutionof 2013. See also Section 56 (1) of the Constitution

> *"All persons are equal before the law and have the right to equal protection and benefit of the law."*[54]

As everyone comes into contact with the law at some time or another, it is vital that the legal system contains adequate machinery for the enforcement of the law. For law to be effective, the wheels of the justice delivery system must contain such institutions like the police, courts and prison service. While police maintain peace and order, the courts resolve disputes and Correctional Service offer rehabilitative and retributive services on behalf of society.

[54] Section 56 (1) of the Constitution of 2013

CHAPTER 2

Principles of Law

2.0 Introduction

The most prominent symbol of the law is Justicia (the goddess of justice). She symbolizes the functions of the law and justice. She is depicted blindfolded, holding scales in her left hand and a sword aloft in her right hand. The symbolic significance of these features is as follows:

a) Justicia‘s Sword denotes the power to use force if it is necessary. Sometimes force or threat of force is necessary to induce some people to comply with the law. Justicia holds her swords aloft for all to see. It is with this sword that obedience is, if necessary enforced.[1]

b) Justicia carries the scales as she is constantly weighing the rights and interests of one individual against those of another so that those belonging to one may not overshadow another’s. Her task in this regard is to achieve and maintain a balance.If she fails in this respect the balance and order on which society depends for its existence are endangered.[2]

c) Justicia demands and proclaims that all persons are equal in the eyes of the law and must be treated as such. This is a fundamental rule of law and explains Justicia‘s blindfold. She is blind to social distinctions of class, disparity in wealth and power, and difference in race, colour or creed.[3]

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[1] Hosten , W.J. et al(1997) ***Introduction to South African Law and Theory*** Second Edition ButterworthsDurban pages247 - 248
[2] Ibid
[3] Ibid

There are five basic principles of modern law.

They are classified as;

1. The law must conform to the prevailing understanding of what is fair, just and right.
2. The law must apply equally to all people irrespective of their social status, level of education, colour, race or creed.
3. The law must be applied in a uniform pattern.
4. The law should only be made by people with the necessary authority.
5. The law should be clearly defined with recognized parameters.[4]

2.1 Just application

The law must conform to the community's prevailing sense of what is fair, just and right. Where law is contrary to these attributes it does not commend itself to the community and is most likely not to be respected and obeyed.[5] Law in general should consist of the general rules which apply to all persons of same class or conditions, students, lecturers, soldiers, majors, minors etc. However, in order to meet exceptional circumstances, exceptions and qualifications have to be attached to the general rules. As rightly pointed out by Hahlo and Kahn,[6]. These exceptions and qualifications should have regard not to individuals, but to all those falling within their terms.

2.2 Equality

The law must apply uniformly not only in regard to all people, but to all areas. Nobody is above the law and selective application of the law is

[4] Hutchson, D. et al (1991) ***Willie's Principles of South African Law*** Juta and Company Ltd Wetton page 14

[5] Ibid

[6] Hahlo H, R and Kahn, E (1968). ***The South African Legal System and Background.*** Juta and Company, Cape Town page 32

wrong in certain circumstances. The law is blind to social status, gender, creed etc. This principle is reflected in the newConstitution.[7] The judicial officers should therefore ensure that everyone is treated with respect and courtesy and with equality according to the law.

According to Hahlo and Kahn[8]equality is another offspring of reasonableness. Equality means equal treatment for persons in equal conditions. Persons in the same legal conditions can expect to be dealt with alike. This is why justice is traditionally depicted as blindfolded. There are however exceptions in regard to equality. The word does not mean absolute equality for everyone.

It would be a miscarriage of justice to treat alike and ignore the difference between an insane and sane person.As long as there exists differences in the conditions of people, legal differentiation is also inevitable. Such differentiations should be in accordance to the parameters of justice. Once it becomes arbitrary, capricious or unreasonable it ceases to be just. As rightly submitted by Hahlo and Kahn[9] the differentiation must be based on objectively, ascertainable and logically relevant distinctions in the conditions of men. This does not imply that every individual man must receive the same dues. It is however unjust to discriminate arbitrarily among equal cases because of social standing, race, creed or colour. However, there is nothing unjust from withholding liquor licences from minors or prohibiting minor girls at tender ages below 18 years from getting married or girls under 16 engaging in sexual intercourse. On the other hand to prohibit a qualified person to register as a legal practitioner, pharmacist or medical practitioner on the sole ground that he is an albino would not only be irrational but grossly unjust.

For persons to be guaranteed equality, they should be assured access to justice. There should be easy and expeditious access to justice. Without the right to easy expedition and access to justice, the enjoyment of other rights cannot be assured.[10] Human rights are interrelated and the full enjoyment of one right has a bearing on the other rights. In this context

[7] Section 56 (1) of the Constitution of Zimbabwe of 2013
[8] Hahlo and Kahn ***op cit*** note 6 page 32
[9] Ibid
[10] International Commission of Jurists; ***Public Perceptions and Access to Justice*** April 2000 pages 42 -43

one can hardly speak of any equality before the law or any rule of law if there is no right of access to courts.

The principle of equality before the law was well elaborated by Rahma J in ***Baroque v Secretary of the Ministry of Irrigation, Water Resources and Food Control (Bangladesh) and Others***.[11] It was noted that;

> *"If justice is not easily and equally accessible to every citizen therecan hardly be a rule of law. If access is limited to the rich, the more advantaged and more powerful sections of society, then the poor and the deprived will have no stake in the rule of law and they will be more readily available to turn against it. Ready and equal access to justice is a* ***sinequa non*** *for the maintenance of the rule of law. Where there is a written constitution and an independent judiciary and the wrongs suffered by any section of the people are capable of being raised and ventilated publicly in a court of law there is bound to be greater respect of the rule of law".*

It is important to note that there are certain barriers which inhibit access to equal justice. It is argued that laws should be crafted or enacted in simple style. On that note it is submitted that the laws of any country should be enacted in a language which the ordinary man understands, or at least translated into those languages.Interpreters must therefore be properly trained. The department must be professionalized and all interpreters should be legally trained in court procedure. The court proceedings must be conducted in the best interest of the litigants and in the language they best understand. Everyone should be treated equally before the law.[12] Unnecessary technicalities should be avoided. Cases should be won on merit rather than technicalities. Over and above all equality can be achieved if frantic and practical efforts are made to eradicate corruption in the judiciary. If the impoverished see the judicial system as mainly serving the interests of the rich and powerful, then equality will cease. In order to fight corruption in the judiciarythere should be zero tolerance to such conduct. Officers of the court should be properly remunerated and trained on ethical issues.

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[11] (2000) 1 LRC 1, at page 28

[12] Hahlo and Kahn ***op cit*** note 6 pages 34 - 35

Corrupt judicial officers should be punished and dismissed.[13] It is only then that equality will be achieved to a certain measure. Impartiality in both the decision and the decision making process is therefore essential to the proper discharge of judicial duties.

2.3 Uniformity

It is essential that the law should apply uniformly not only in regard to all people, but to all areas. To some extent, this requisite overlaps with the legal need for equal treatment for all persons expressed above.However, the law should have general application to all people throughout the country. The law applicable in one part of the country should be the same in any other part of the country. This implies that law should consist of general rules which apply uniformly to all persons of the same class or condition. These rules must be applied consistently. If the impoverished see law and the judicial system as mainly serving the interests of the rich and powerful, the demise of the rule of law and democracy will become inevitable. This would in turn be an affront to the founding values and principles of the Constitution.[14]

2.4 Authority

The law should only be made by those bodies with the proper authority. In Zimbabwe the main laws are made by thelegislature. The President, parliament, local authorities, the executive ministers of state and other statutory bodies are clothed with legislative authority.[15]

Legislation is by far the most important source of new law today.Legislation expresses a relationship between man and state. It is abrogative, capable of self-altering and flexible. It is therefore important

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[13] See Hollis, K. ***Corruption Issues for Judges and Magistrates:*** Journal of the Commonwealth Magistrates' and Judges' Association Vol 14 No. 3 June 2002 pages 9-15

[14] Hahlo and Kahn***op cit*** note 6 pages 34 - 35 See Sectionsof 118 - 119

[15] Linington , G. (2001) ***Constitutional Law of Zimbabwe Legal Resources Foundation*** **Harare** page 133 The Constitution of Zimbabwe of 2013

to note that legislation is a generic word covering the instruments passed by the various legislative organs having authority to make laws in the country approved by parliament.[16]

In Zimbabwe Parliament consists of the House of Assembly and Senate. There are elected and non-elected but appointed members of the august house. Local authorities such as municipalities and councils have authorities to make by laws.[17] Ministers have the authority to make some statutory instruments. Other bodies have authority to make various rules and regulations in accordance with the given mandate subject to approval by parliament.

2.5 Certainty

Certainty is an end product of a combination of generality, reasonability and equality. It is trite that the law should be clearly defined with recognized parameters. It is important that people know what the law is and then regulate their conduct accordingly. Legal rules must be clear and unambiguous. They must also be clearly defined and made known before they are applied. In most cases like or same cases with similar facts are dealt with alike. Where such facts are similar and where similar judgments and rulings have been made the results of a law suit can generally be predicted. In turn the majority of people can anticipate certain outcomes. It is however argued that some general rules can at the same time produce certainty and also rigidity. Sometimes it is not possible to predict outcome of a trial.[18] The law should however be geared in such a way that it should be dynamic and adapt to economic and social, expectations and circumstances.

2.6 The doctrine of separation of powers

Zimbabwe is a constitutional democracy. There are three pillars of state. These are the Executive, the Legislature and the Judiciary.[19] Each pillar

[16] See Feltoe, G. (2006) ***A Guide to the Administrative and Local Government Law in Zimbabwe*** Legal Resources Foundation Harare pages 15 - 16.
[17] Linington ***op cit*** note 15 page 95
[18] Hahlo and Kahn ***op cit*** note 6 page 137
[19] Madhuku, L (2010) ***An Introduction to Zimbabwean Law*** Weaver Press pages 44-48

derives its authority and mandate from the constitution. In a functioning democracy, the three pillars of state should be independent of each other to enable the existence of checks and balances.[20]

The Legislative arm of government makes the law, for the peace, order and good governance.[21]It passes Acts of Parliament and controls the budget.[22]

The Executive arm executes the instructions of the legislature, including expenditure according to the budget.[23] The executive authority of Zimbabwe vests in the President who exercises it, subject to the Constitution through the cabinet.[24]

The Judiciary determines how laws should be applied, including the constitutionality of any laws.[25] The establishment of the Constitutional Court was a milestone in the development of legal jurisprudence in Zimbabwe.[26] The Judiciary also determines how laws should be interpreted so that there is equality, uniformity and certainty in line with the principles of law.[27]

The Judiciary occupies an indispensable position in the current order. It is an essential ingredient for good governance and the maintenance of the rule of law in a democratic state.[28] As a result officers of the Judiciary are expected to be independent, act impartially, have good integrity, be competent and diligent, be fair, keep abreast with the law, among other attributes.

The rule of law is functional in a democracy where the three pillars of the state effectively respect and compliment each other. Raz J (1977) the leading legal positivist after H.I.A Hart and one of the proponents of the doctrine of the rule of law claims that the rule of law is a condition of individual liberty.[29]

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[20] Ibid
[21] Ibid
[22] Ibid ***Op cit*** note 15 Constitution of ZimbabweSections 116-119
[23] Madhuku ***op cit*** note 19 pages 46 to 47
[24] Ibid Section 88 (2) of the Constitution
[25] Sections 164 to 165 of the Constitution
[26] Section 166 of the Constitution
[27] Section 164 of the Constitution
[28] Section 164 (2)(a) of the Constitution
[29] Raz J ***The Rule of Law and its Virture*** (1977) 93 Quarterly Review 195, 201.4.

CHAPTER 3

Sources of Law

3.0 Custom and customary law

3.1 Custom

It is traditional to refer to custom as a source of law. As pointed out by Redgment, J.[1] custom was an important source of law among the Germanic people. It was also recognized in courts in various regions of Holland. The courts developed jurisprudence by incorporating concepts derived from custom. Custom became binding and recognized as a source of the law. Some institutional writers viewed customary law as a special type of Roman Dutch Law. It was not derived from the written Roman law but its roots were from the customs of regions of Holland.[2] The people strongly recognized the custom. The courts crystalisedand juxtaposed customs in the judgments and customary law became binding.

In most of the modern legal systems custom is not very important as a source of formative law.[3] It is therefore trite law that he who relies on the existence of a custom must prove that it has been long established and uniformly observed and is reasonable and certain. The ***locus classicus***or leading case illustrating these essential requirements is the South African case of ***Van Breda v Jacobs***.[4] The plaintiffs in this case were fishermen. The defendants were also a different group of fisherman in the waters. The plaintiffs saw a shoal of fish approaching near the shore. They set their nets from the beach in a bid to catch the shoal. Soon afterwards, the defendants placed their nets a short distance in front of the plaintiff's nets. As a result they intercepted the fish and caught

[1] Redgment, J. (1981) ***Introduction to the Legal System of Zimbabwe*** Belmont Printers Harare page 16

[2] Hahlo, H.R and Kahn, E. (1968) ***The South African Legal System and its Background.*** Juta and Company Limited Cape Town pages 302 - 303

[3] Ibid

[4] ***Van Breda v Jacobs*** 1921 AD 330

the whole shoal. The plaintiffs invoked a long existent local custom which traditionally existed among fishermen within that locality. It was trite custom that he who first came had the right to first pull, i.e. first come, first pull. The plaintiffs therefore submitted in their argument that the defendants had violated the custom in that they had no right to first pull where they had not first come. Due to their unjustified conduct they deprived the plaintiffs of their right to catch the shoal.

In coming up with its decision the court noted that the requirement of the Roman Dutch Law and the English Law were four fold. For one to rely on custom it had to be shown to be an ancient custom. The custom should be uniformly observed in the locality since time immemorial or time of its origin.[5] It must be reasonable in the sense of being just and fair in the eyes of a reasonable person. Eleven witnesses testified in the case. The court held that by virtue of the evidence led by the eleven witnesses the custom had been proved. It was further held that the custom was eminently reasonable. The custom had also been strictly observed for forty five years leading to the event in issue. Judgment was therefore entered in favour of the plaintiffs.[6]

The English common law derived its origins from the local custom of the people of England. Sometimes the ideas came from other sources such as canon law. Despite this such ideas from canon law were made acceptable by an assertion that these were the customs of the English people.[7]

A 'trade usage' is a form of custom. Such custom is confined to a particular trade or locality. The requirements are however not identical to the ones discussed and enunciated above in ***Van Breda***[8].

There is no need to prove that a 'trade usage' is of ancient origin. The custom can be so common, accepted and notorious that courts would readily take judicial notice of its existence in a trade locality.

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[5] Ibid See also ***Catering Equipment Centre v Friesland Hotel*** 1967 (4) SA 336 (0)

[6] ***Van Breda v Jacobs***

[7] Redgment ***op cit*** note 1 page 16 See also Dias, R.W.M (1976) ***Jurisprudence*** 4th Edition Butterworths page 709charging interest on the capitalized sum "without perhaps flaunting that fact before their customers".
See also ***Van Breda v Jacobs*** 1921 AD 330

[8] ***Barclays Bank International Limited v Smallman*** 1976 (2) RLR 163
N.B Evidence was led to establish the custom of commercial banks capitalizing the unpaid interest monthly and

3.2 Customary Law

In Zimbabwe customary law is interpreted as the legal rights and duties affecting indigenous people observing a traditional lifestyle. The indigenous people of Zimbabwe are the black Africans who originate from this country. Customary law is defined in Section 2 of the Customary Law and Local Courts Act as,

> *"The customary law of the people of Zimbabwe, or any section or community of such people, before the 10th June 1891 as modified and developed since that date."*[9]

Zimbabwe is not the only country where there is customary law. The significance of customary law in many countries has been eroded with the passage of time.[10]It follows that custom has dried up as a source of law in many modern legal systems such as South Africa.[11] It is therefore relatively important as a formative source of law. In Zimbabwe, customary law is known as the oldest form of law which has existed from time immemorial. The disadvantage was that it was not written law for the greater part of legal history. In the past information regarding customary law was passed from one generation to the next by word of mouth. In recent times efforts have been made to record the law in written form.

Customary law applies to civil cases in Zimbabwe and has been recognized for generations.[12] Although customary law applies throughout Zimbabwe it is not necessarily uniform. It is quite possible for the customary law affecting one group to differ from that affecting another. Customary law affecting the Ndebele people is different in many respects with that affecting the Shonas. Even among the Shonas and Ndebele's customary law is affected by the geographical boundaries. It follows that a person may or may not be governed by African customary law depending with various factors affecting the matter in question.[13]

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[9] Section 2 of the Customary Law and Local Courts Act [Chapter 7:05]
[10] Redgment ***op cit*** note 1 page 17
[11] Hahlo and Kahn ***op cit*** note 2 page 302
[12] Madhuku, L (2010) ***An Introduction to Zimbabwean Law*** Weaver Press Harare page 26
[13] Ibid

The colonization of Zimbabwe inevitably had an impact on the existing legal system. The settlers brought with them their imported legal system. This system was fundamentally the Romans Dutch system applied in the Cape and there was therefore a need to try and reconcile the two conflicting systems.[14] The colonisers, having achieved a military success, applied their system of public law. However, when it came to private law the customary law of the indigenous people was recognized and continued to have effect.[15] The advantage to the colonial regime was that order was maintained.

Customary law was recognized in the Royal Charter of 1890, which required the British South African Company to have "careful regard" for it.[16] Subsequent legislation adopted a similar approach and customary law remains applicable to the present day.Section 89 of the Lancaster House drawn Constitution provided that;

> "*Subject to the provisions of any law for the time being in force in Zimbabwe relating to the application of African Customary law, the law to be administered by the Supreme Court or the High Court and by any courts subordinate to the High Court shall be the law in force in the colony of the Cape of Good Hope on 10th June 1891, as modified by subsequent legislation in Zimbabwe having the force of law."*[17]

It is imperative to look at the Customary Law and Local Courts Act 1990, which provides for the application of customary law.[18] Section 3 (1) states as follows;

a) Customary law shall apply in any civil case where-

i) The parties have expressly agreed that is should apply; or

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[14] Child, H, (1965) ***The History and Extent of Recognition of Tribal Law in Rhodesia*** Second Edition Ministry of Internal Affairs pages 1 - 8

[15] alsoGoldin and Gelfand M. (1976) ***African Law and Custom in Rhodesia*** Juta and Company Pvt Ltd Cape Townpage 244

[16] The Royal Charter of 1890whichrecognised customary law

[17] Section 89 of the repealed Lancaster House Drawn Constitution

[18] The Customary Law and Local Courts Act 1990 [Chapter 7:05]

ii) Regard being had to the nature of the case and the surrounding circumstances, it appears that the parties have agreed it should apply; or

iii) Regard being had to the nature of the case and the surrounding circumstances; it appears just and proper that it should apply',

b) The general law of Zimbabwe shall apply in all other cases".[19]

"Surrounding circumstances" are defined in Section 3 (2) as, without limiting the expression, including:-

a) The mode of life of the parties
b) The subject matter of the case
c) The understanding by the parties of customary law or the general law of Zimbabwe, as the case may be applied
d) The relative closeness of the case and the parties to customary law or the general law of Zimbabwe, as the case may be.[20]

3.3 General Law

3.3.1 Common Law

The expression common law means that part of the law common to the whole of Zimbabwe, which is not created by statute. The national law of Zimbabwe is founded largely upon Roman Dutch Law which is generally held to be the common law of this country. This is however an over simplification of the position. Over the years there have been other influences notably that of the English system.[21]

In order to understand the present position it is necessary to have some knowledge of the past. One has therefore to go down memory lane to trace and examine briefly the history of Roman Dutch Law and its influence in Zimbabwe. In 1652 Jan Van Riebeeck a Dutch sailor landed

[19] Section 3 (1) of the Customary Law and Local Courts Act (Chapter 7:05)
[20] Section 3 (1) of the Customary Law and Local Courts Act
[21] Redgment ***op cit*** note 1 page 16

at the Cape of Good Hope.[22] He had with him law books relating to the law in Holland, which was a province of the Netherlands.

That law had evolved from Roman law and it was in 1652 that the expression Roman Dutch Law was first used. Roman law was developed during the time of the Roman Empire. It was therefore spread throughout that empire which extended beyond Rome itself.[23] The Roman law was a system of law which had been developed to a high degree of excellence, by custom, by jurists and by legislation in Rome. It was developed in the course of a thousand years prior to the sixth century as noted by Hutchison D,et al[24].

The influence of Roman law spread throughout Europe. The degree of assimilation of Roman law varied from each country.[25] In some countries, such as German States, it was officially declared to be the law. In others, such as Scotland, it infiltrated subtly into the system. In England there was resistance to Roman law and to this day its influence is minimal.[26]

In the seventeenth and eighteenth centuries prosperity based on trading came to the Netherlands and produced a number of highly regarded legal writers who further developed Roman law.[27]

Although the influence of this school was largely swept away by the invasion of the Netherlands by Napoleon in 1806 it was this refinement of Roman law that arrived in the Cape with Van Riebeeck and known as Roman Dutch Law. Van Riebeeck and other pioneers settled at the Cape of Good Hope and introduced general principles and rules of law consolidated as Roman Dutch Law.[28]

The next major phase in the development of the common law of Zimbabwe was the British capture of the Cape territories in 1806. The Cape was ceded to Great Britain in 1806 but the existing legal system was preserved.[29] The common law remained in force but this heralded a new era in which the influence of English law then began. There was no

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[22] Ibid
[23] Redgment ***op cit*** note 1 page 16- 17
[24] Hutchison, D. ***et al*** (1991) ***Wille's Princiles of South African Law*** Juta and Company Limited Wetton page 21
[25] Redgment ***op cit*** note 1 pages 6 - 10
[26] Redgment ***op cit*** note 1 page 16 Madhuku ***op cit*** note 12 pages 18 - 21
[27] Redgment ***op cit*** note 1 pages 10 – 12
[28] Hutchison ***op cit*** note 24 page 27
[29] Hutchison ***op cit*** note 24 pages 27 - 28

radical or dramatic immediate change although over a period there was a gradual and substantial shift.

By 1891 the common law of South Africa had become Roman Dutch with a high English flavour.[30] This was the common law adopted by Southern Rhodesia.

The British South Africa Company was empowered by the Royal Charter to govern Southern Rhodesia.[31] The company was given a special mandate and task to appoint judicial officers and to establish such courts as were necessary for the administration of justice. The company administrator A.R Colquhoun made a declaration that the laws of the Cape Colony were to be applied to the territory of the company.[32]

The declaration of the applicability of the law of the Cape Colony was repeated in the proclamation of the 10th June 1891 and again in the Matebeleland Order In Council of 18th July 1894.[33] The Roman Dutch Law in effect at the Cape Colony on 10th June 1891 became the general law that was to be administered by the courts of the country. The courts were however not bound to follow decisions of the Cape courts on the Roman Dutch law. Since then the common law of Zimbabwe has developed to suit this country whilst still being able to draw on English and Roman Dutch influences.

3.3.2 Precedent

This forms part of the common law but exclusively refers to those rules which must be inferred from the decisions of high court and supreme courtjudges and their predecessors in decided cases. As rightly pointed out by Redgment;

> *"The pull of the past is strong. This is psychological comfort in doingwhat was done before, and sound sense. To think each*

[30] Hutchison ***op cit*** note 24 page 28
[31] See the Royal Charter of 1890
[32] Law Society of Zimbabwe feature Article ***Historical Development of the Legal System in Zimbabwe*** Zimjuris Special Centenary Issue November 2009 page 41
[33] Matebeleland order in Council of the 18th July 1894

> *problem anew is time consuming compared with looking back to see what was done before. This brings the benefit of predictability.*[34]

In the legal field there is a natural inclination to regard the decisions of the past as a guide to the actions of the future as noted by Hahlo and Kahn[35]. The law utilizes this natural inclination. The doctrine of precedent is therefore found in almost every jurisdiction. There is respect and certainty and quick resolution of cases. As noted by Dias R,W,Mit is a"*Fundamental principle that like cases should be treated alike."*[36] This implies that similar cases should be treated in a similar way. It becomes disturbing and worrying if similar cases are treated differently. Where there is doubt and no certainty the public loses faith in the courts.

Authority given to past judgements is called the doctrine of precedent. The principle of the application of the doctrine of precedent is expressed in the latinmaxim as ***stare decisiset non quietamovere.*** This means stand by the decision and do not disturb what is settled.[37] The principal advantages of this doctrine as noted by Hahlo and Kahn[38] is certainty, predictability, reliability, equality, uniformity and convenience.

In our own jurisdiction the doctrine of precedent refers to the fact that within the hierarchical structure of the Zimbabwean courts, a decision of a higher court will be binding on a lower court in the hierarchy. The constitutionalcourt of Zimbabwe standing as the highest court in the land binds all courts below it in the hierarchy. As regards its own previous decisions it is free to depart therefrom. It is in other words not bound by its own decisions. Although not so bound, the higher courts do not exercise their discretion to depart from previous decisions lightly. In the case of ***Minister of Lands and Others v Commercial Farmers Union (CFU)*** the supreme court in its reasoning departed from the supreme court case of ***Commercial Farmers Union (CFU) v Minister of Lands and Others***.[39]

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[34] Redgment ***op cit*** note 1 page 20
[35] Hahlo and Kahn ***op cit*** note 2 page 214
[36] Dias ***op cit*** note 7 page 709
[37] Redgment ***op cit*** note 1 page 21
[38] Hahlo and Kahn ***op cit*** note 2 page 215
[39] ***Minister of Lands and Others v Commercial Farmers Union (CFU)*** 2001 (2) ZLR 457 (S) See also ***Commercial Farmers Union (CFU) v Minister of Lands and Others*** S132 – 2000

High Court decisions have a binding force on lower courts. The high court is itself bound by the decisions of the supreme court and constitutional court.[40] Its decisions in turn bind magistrates' courts and those courts below them. Individual decisions of high court judges have binding force on courts subordinate to the high court. Such decisions however do not bind other judges of the high court although they are of strong persuasive authority. In practice other judges tend to follow such previous decisions. Only in the rarest of occasions will one judge depart from a previous decision of another judge.[41] On the lower scale in the hierarchy, decisions of magistrates' courts and other inferior courts subordinate to them have no binding force whatsoever.

It is proper in theory to submit that courts should be bound by decisions of superior courts but the principle cannot be applied unless the inferior courts are aware of what has happened in the past. This requirement can only be satisfied if the earlier decisions have been reported. There is therefore a need for adequate law reports containing judgments of courts of record.

There are two parts to a judgement which are;the***ratio decidendi*** (the reason for the decision) and the***obiter dictum*** (said by the way or incidentally)[42]

It is the ***ratio decidendi*** which binds the courts although courts have the power to "distinguish" cases by finding that the facts of the present case are so different from the facts of the case creating the precedent that it need not be followed.[43] Despite the need for stability the law must be responsive to social change. ***Obiter dictum*** is the judge's expression of opinion uttered in court or in a written judgement. The utterance is not essential to the decision and therefore not legally binding as a precedent.

The Judges are not part of the legislature. The question is whether the judges of the highercourts make or change law? The answer to the question is, in essence yes.

[40] Madhuku ***op cit*** note 12 pages 64 -66
[41] Compare and contrast the CFU cases (*Supra*)
[42] Redgment ***op cit*** note 1 page 20 Hutchison ***op cit*** note 24 pages 5 -7
[43] Hahlo and Kahn ***op cit*** note 2 pages 270- 272

Judges do make the law but it is necessary to look at the rules of precedent to see how they are able to do it.[44] They can do so through judicial activism. This is found in Law Reports such as those listed by Reynolds D.A.[45]

3.3.3 Authoritative Texts

Some legal scholars have earned some reputation through writing of texts and articles. Such work has been accepted in legal circles as being authoritative. The Treatises of the Roman Dutch Jurists are one such example.[46] As rightly noted by Madhuku[47] they are regarded as sources under the heading of common law. This is because of their special nature.

Many legal scholars have also contributed to articles and other publications. Some have emerged as critics of certain aspects of the law. Some authors have been well accepted in the legal field and their work has been accepted as a point of reference. Such work is quite persuasive in our courts depending with the standing of the author as pointed out by Madhuku[48].

3.3.4 Law Reports

The doctrine of precedent works if there is law reporting. In Zimbabwe the reports have followed the historical and political journey of the country. Up until 1955 there were the Southern Rhodesian Law Reports (SRLR).[49] During the Federation of Rhodesia and Nyasaland the law reports between 1955 and 1963 were known as Southern Rhodesia and Nyasaland Law Reports (SRN).[50] The countries bound were Southern

[44] ***S v Juvenile*** 1989 (2) ZLR 61(SC) See also ***Zimnat Insurance Company Limited v Chawanda*** 1990 (2) ZLR 143
[45] Reynolds, D.A (1983) ***An Introduction to Law*** Ministry of Justice Harare
[46] Madhuku***op cit*** note 12pages 10, 11 and 23
[47] Madhuku ***op cit*** note 12page 32
[48] Ibid
[49] Example is the citation ***R v Chokumarara*** 1945 SR 88
[50] Example is the citation ***Five v Mbambo*** 1953 SRN 315

Rhodesia now Zimbabwe, Northern Rhodesia now Zambia and Nyasaland now known as Malawi. With the coming of the Rhodesia Front into power the reports changed into Rhodesia Law Reports (RLR) from 1964.[51]

Upon attaining independence the reports changed into Zimbabwe Law Reports (ZLR).[52] There is normally an (S) indicating that it is a supreme court decision and an (H) indicating that it is a high court decided case.

[51] Example is the citation ***S v Mfungelwa*** 1967 RLR 308

[52] Madhuku ***op cit*** note 12 page 33 Example is the citation ***S v Makhado*** 1991 (1) ZLR 467 (H)

CHAPTER 4

Choice of Law Rule

Choice of law rule

Choice of law is a procedural stage in litigation of a case involving conflicts of laws. It involves what law should apply in a particular dispute brought about by the dual or multi – legal system and conflict of laws.[1] It refers to what jurisdiction's law is to be applied in a dispute. The choice of law concept applies in Zimbabwe by virtue of the dual legal system and conflict of laws. There are two legal systems co-existing in Zimbabwe hence the choice of law rule applies.[2] It can be seen that although Section 89 of the Lancaster House drawn Constitution made the general law the law of the country it did not assist us to find out how customary law and general law co-exist. Similarly, the new Constitution which provides for the law to be administered by the courts of Zimbabwe does not expressly provide how general law and customary law co-exist. This seems to be left to the courts to interpret law.[3]

The application of customary law in Zimbabwe in any given case is governed by Section 3 of the Customary Law and Local Courts Act which statesthat;

> *"Subject to this Act and any other enactment, unless the justice of the case otherwise requires –*
>
> *(a) Customary law shall apply in any civil case where –*
> *(i) The parties expressly agreed that it should apply; or*

[1] Ncube, W (1989) ***Family Law In Zimbabwe Legal Resources Foundation*** pages 15 to 26 also Galen, D ***Internal Conflicts Between Customary Law and General Law in Zimbabwe***: Family Law as a case Study; ZL Rev. Vol. 1 and 2, 1983 – 84, 3 at page 20

[2] Ncube ***op cit*** note 1 pages 20 - 26
See also ***Musakwa v Musakwa*** SC 11/84

[3] Section 89 of the repealed Lancaster House drawn Constitution of Zimbabwe repealed by Amendment (Number 20) Act 2013

(ii) regard being had to the nature of the case and the surrounding circumstances, it appears that the parties have agreed it should apply or

(iii) regard being had to the nature of the case and the surrounding circumstances, it appears just and proper that it should apply;

(b) The general law of Zimbabwe shall apply in all other cases.[4]

"Surrounding circumstances" are defined as, without limiting the expression, including-

(a) "The mode of life of the parties.
(b) The subject matter of the case;
(c) The understanding by the parties of the provisions of customary law of Zimbabwe, as the case may be applied to the case;
(d) The relative closeness of the case and the parties to customary Law or the general law of Zimbabwe, as the case may be."[5]

The application of customary law in this country is well documented. It also has a long history. It was first recognized in Section 9 of the High Court Commissioner's Order in Council of 10 June 1891 which provided that;

"*Decisions shall follow the laws and customs of the natives concerned in so far as they are applicable, provided that if such laws and customs conflict or are not clearly proved or if such laws or customs should be found to be incompatible with the peace, order and good governance, the court may decide in*

[4] Section 3 (1) of the Customary Law and Local Courts Act [Chapter 7:05]
[5] ***Op cit*** note 4 Section 3 (2)

> *accordance with the law which would regulate the decisions if the matter in dispute concerned persons of European birth or descent."*[6]

In 1894 the High Commissioner's Order in Council was replaced by the Matabeleland Order in Council.[7] Customary law was however retained and recognized in a similar fashion.

The next significant development took place in 1937. The enactment of the Native Law and Courts Act was a landmark development.[8] It provided that;

> *"In the determination of any civil case between natives by any court of law, decisions shall be in accordance with native law custom, but if native law and custom is inapplicable to the cause or matter before the courts*
>
> *(a) any court of law other than a native court shall determine the case in accordance with the law of the colony.*
> *(b) a native court shall state all proceedings in the case to the Native Commissioner of the district for decision or transfer to a court of competent jurisdiction."*[9]

Between the years 1891 and 1937 the Native Law and Courts Act made the application of customary law mandatory.[10] During this period, the common law was made applicable in all those cases where no remedy was available at customary law. The Native Law and Courts Act sanctioned the application of customary law for nearly eighty years. During the period extending from 1937 to 1969 common law remedies were applied to those cases where no remedy was available at customary law.[11] After being in force for nearly eight decades the Native Law and

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[6] Section 9 of the repealed High Court Commissioner's Order in Council of the 10th June 1891.
[7] Matabeleland Order in Council of 1894
[8] Section 3 (1) of the repealed Native Law and Courts Act of 1937
[9] Section 3 (1) of the repealed Native Law and Courts Act of 1937
[10] Child, H (1965) ***The History and Extent of Recognition of Tribal Law in Rhodesia*** Second Edition Ministry of Internal Affairs Salisbury page 15
See also ***Vela v Madinika and Magutsa*** 1936 S.R. 71
[11] Ibid

Courts Act was repealed in 1969. It was replaced by the African Law and Tribal Courts Act. It provided that;

> *"subject to the provisions of this section and of any other enactment, in the determination by any court of law of any civil case between Africans or between African and a person who is not an African the decision may be given in accordance with customary law.*[12]
>
> *(1a) save as otherwise provided in this section, unless the justice of the case otherwise requires –*
>
> *(a) customary law shall be applicable in any case which is between Africans and which relates to –*
>
> *(i) seduction or adultery; or*
> *(ii) the customary or guardianship of children; or*
> *(iii) the devolution otherwise than by will of movable property on the death of an African ….; or*
> *(iv) rights in land which is not held under individual registered title; or*
> *(v) marriage consideration; or*
> *(vi) a marriage between Africans contracted under customary law, whether or not it has been solemnized under the African Marriages Act [Chapter 238]*
>
> *(b) The law of Rhodesia shall be applicable in any other case."*[13]

The African Marriages Act [Chapter 238] is now [Chapter 5:07] while the name Rhodesia changed to Zimbabwe upon the attainment of independence in 1980. The following provision was also included.

[12] Section 3 (1) of the repealed African Law and Tribunal Courts Act [Chapter 237 of 1974]
[13] See ***Yobe v ChadburaGamiel and JairosiLunga*** S.R. N. 652

> (4) "*In cases where no express rule is applicable to any matter in controversy, the court shall apply the principles of justice equity and good conscience."*[14]

The cited provision meant that if customary law did not meet the justice of the case then the common law had to apply. This implies that at the end of the day common law prevailed over customary law. An illustration of this was demonstrated in the three cases of ***Chikosi v Chikosi.***[15]

The decision in these three cited cases was based on the following facts. The parties were both Africans. In 1961 they contracted a marriage under African Customary Law. This union was duly registered in terms of the then African Marriages Act (Chapter 105). They then went to live in the United States where they entered into a second, civil, marriage in Nashville, Tennessee, in 1964. Thereafter they were blessed with three children. When the husband had qualified as a dentist, the parties returned to Zimbabwe. They continued to live in typical "Western" or European fashion.

The first case between the parties was brought before the courts in March 1973. The wife applied for custody of the three children and maintenance for the children and herself, pending the hearing of her divorce suit. The respondent husband opposed this application, alleging that she did not have ***locus standi***, in that she was not duly assisted by her guardian according to African customary law. In arriving at its decision that the wife had ***locus standi*** the court adverted to and invoked the provisions of Section 3 of the African Law and Tribal Courts Act, Number 24 of 1969. This provision determined when African Law had to be applied in the resolution of civil suits between Africans. It was held that in terms of Section 3 (1) (b) of the Act, it appeared that the capacity of a married woman to claim dissolution of her marriage was one of the matters governed by the law of the country. Accordingly, the applicant wife had ***locus standi*** to apply for any ancillary matrimonial relief.

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[14] Section 3 (1) of the repealed African Law and Courts Act Chapter 237 of 1974 Tribal

[15] ***Chikosi v Chikosi 1973 (1) RLR*** 199 G; 1973 (3) SA 145 (R)
See also ***Chikosi v Chikosi 1973 (1) RLR*** 163 G; 1973 (3) SA 142 (R) 199 G; 1973 (3) SA 145 R
See also ***Chikosi v Chikosi 1973 (1)*** 1975(2) SA 644
See also Goldin, B and Gelfand, M 1975 ***African Law And Custom In Rhodesia*** Juta and Company (LTD) Cape Town pages 61 to 62

The second hearing of ***Chikosi*** took place in April 1973. The applicant wife sought custody ***pendente lite***, maintenance for herself and her children and an order for the recovery of movable property which was being held by the respondent husband. In arriving at its decision that the wife had the capacity to claim custody and maintenance for the children, the court found that the justice of the case demanded the application of common law principle, as opposed to the principles of African law. In arriving at this decision the court made reference to;

> *"the circumstances of the parties, their standard of education, their business and social status, their mode of living and the tenets and moral principles which attach to their marriage by christian rites."*

Accordingly, the common law was applied to both the custody of the children and capacity to claim it. The court went on to determine custody of the children in terms of Section 3 (5) of the Act. It provided that the interests of the children concerned were of paramount consideration, irrespective of which law or principle was applied.The applicant wife's ***locus standi*** to claim custody in this case was clearly decided on principles different to those in the first Chikosi case, namely, the life style of the parties. This implied that the various factors which made up the life style of the parties could do much to indicate the appropriate legal system. Surely, if the parties had adopted a thoroughly western way of life, one would obviously expect that their reasonable expectations and station in life would be to apply European law. Reference in this respect is also made to ***Ex Parte Minister of Native Affairs: In - re Yako v Bevi***.[16]

The Chikosi decision in the second case clearly shows that a rigid choice of law rules which have no reference to the individual social circumstances of the parties is destined to achieve injustice. The ideal choice of law rules should be flexible. The "justice of the case" provision invoked in the Chikosicase left the court with wide discretion to entertain a wide variety of factors in determining the most appropriate legal system.[17]

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[16] ***Ex Parte Minister of Native Affairs; In re Yako v Bevi*** 1948 (1) SA 388 (A.D.) at 398

[17] ***Chikosi v Chikosi*** 1973 (1) RLR 199 G, 1973 (3) SA 145 (R)

The third and last ***Chikosi***case was heard in March 1975.[18] The plaintiff wife claimed divorce, based on allegations of cruelty, custody of three minor children, maintenance for herself and the children. She also prayed for a declaration that she should be entitled to a half share in a joint estate created by the pooling of their respective incomes. The defence raised various objections***in limine***, ***inter alia***

> *(a) "the**locus standi**of the wife to sue for divorce.*
> *(b) the validity of the second marriage contracted in America, in view of the pre-existing marriage under African law; and*
> *(c) in consequence, if the African marriage was still valid, that the property rights should be determined by African law."*

It was held that the African marriage was valid only "according to African customary law and custom." The Act gave the parties the right to contract civil marriage. This was valid for all purposes and not only African law and custom. The objection by the defence to the plaintiff wife's ***locus standi*** fell away, presumably on the fact that a civil marriage was a valid union for all purposes. On the issue of the property rights of the wife, it was held that these continued to be governed by Section 13 of the African Marriages Act.[19] Section 13 could not apply to the civil marriage contracted in the United States because the matrimonial proprietary regime of the marriage was fixed by the husband's domicileat the date the first marriage was contracted. The doctrine invoked by the learned Judge was that of immutability. This implies that the change in the husband's domicile had no bearing and did not in any way affect the proprietary regime which was fixed by the husband's domiciliary law at the date of the marriage. In this respect the marriage was an African Marriage.[20] It meant the husband's domicile was nothing else than Zimbabwe. In view of the fact that African law governed the spouses' property, the claim for a declaration that there had been a pooling of income and that the plaintiff wife was entitled to a half share failed.

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[18] Ibid
[19] ***Op cit*** note 15 Ncube ***op cit*** note 1page 15 to 26
[20] African Marriages Act [chapter 238] which is now [Chapter 5:07]

In ***Gomwe v Chimbwa*** a father, basing his claim on customary law, claimed seduction damages against a man who had seduced his eighteen year old unmarried daughter. This was before the decision in ***Katekwe v Muchabaiwa***.[21] The father was awarded damages by the community court. The defendant appealed to the Supreme Court arguing that general law instead of customary law should have been applied to the case. The appellant [defendant in the court ***aquo***] argued that having regard to the nature of the case and the surrounding circumstances, it was not just and proper that customary law should apply. The respondent argued that the fact that both parties to the case resided in Dombotombo, Marondera and the Respondent's daughter worked for the appellant in a shop showed that the surrounding circumstances were urban and commercial and therefore pointed towards the application of general law rather than customary law.

The court disagreed. The court had to consider whether it was just and proper to apply customary law "regard being had to the nature of the case and the surrounding circumstances" as contemplated by Section 3 (1) (a) (iii) of the Act. The court noted that 'surrounding circumstances' as defined in Section 3 (2) included such things as the mode of life of the parties, the subject matter of the case, the understanding of the parties of the applicable provisions of customary law or general law and the relative closeness of the parties to either general law or customary law. Apart from the fact that the Respondent [plaintiff in the court ***aquo***] lived in Dombotombo, there was nothing else in the evidence before the court to show that he fitted into the urban or commercial background as argued by the appellant. Moreover, the nature of the case namely, a claim for seduction damages by a father in respect of the seduction of an adult daughter, pointed strongly towards the application of customary law. According to the court it also seemed the parties had implicitly agreed that customary law should apply because "the whole case was conceived, opposed and conducted on that basis, the essence of the claim being the wrong done to the girl's father by the reduction in value of the traditional "***roora***…"

[21] ***Gomwe v Chimbwa*** 1983 (2) ZLR 121 (SC)
See also ***Katekwe v Muchabaiwa*** SC 87/84

The Supreme Court therefore concluded that the court ***a quo*** was correct in applying customary law instead of general law. Sub – paragraphs 3 (1) (a) (ii) and (iii) of the Act seemed to have been relied on by the court. In other words having regard to the nature of the case and the surrounding circumstances, it appeared the parties had implicitly agreed that customary law should apply [3 (1) (a) (ii)] and also it appeared just and proper that customary law should apply [3 (1) (a) (iii)]. The case of ***Lopez v Nxumalo***[22] illustrates the non-racial nature of the present choice of law criteria as opposed to the pre-independence racially based criteria. The court applied customary law to a case where the plaintiff was African but the defendant was Portuguese. The plaintiff sued the defendant for seduction damages in respect of the seduction of the plaintiff's daughter. The Community Court had awarded the plaintiff damages.

In ***Deputy Sheriff, Harare v Mafukidze and Another***a husband and wife were married under the Marriage Act [Chapter 5:11].[23] A judgement was obtained against the husband for a debt owed by him. The Deputy Sheriff attached goods from the matrimonial home. The wife sought to prevent the sale, claiming the goods were her own property. The judgment creditor opposed the application. One of his arguments was that the wife did not own the property. Such ownership was excluded by Section 13 of the Customary Marriages Act as submitted by the Judgment Creditor.[24] That section provided that marriage between Africans in terms of the Marriage Act did not affect the property of the spouses and that the marriage property devolved according to customary law unless disposed off by will. This was repealed by Section 7 of Act 6/97.

It was held by Chinhengo J (as he then was) that the controversy which existed as to whether property acquired by a married African woman by means of monies earned from her employment should have been resolved by legislation. The learned judge went on to point out that in the absence of such legislation the court had to pronounce on the issue. What the learned judge was implying was that where there is a

[22] ***Lopez v Nxumalo*** SC 115/85
[23] ***The Deputy Sheriff Harare v Mafukidze and Another*** 1997 (2) ZLR 274 (H)
See also the Marriages Act Chapter [5:11]
[24] Section 13 of the Customary Marriages Act [Chapter 5:07]

lacuna or gap in the law which results in a conflict, the court has a duty to resolve the issue. The court should make a decision in order to resolve the dispute.

The learned Judge made reference to the case of ***Jena v Nyemba***[25] and ***Mujawo v Chagugudza.*** He highlighted the apparent conflict between the two cases.

In ***Mujawov Chogugudza***[26] it was decided that the choice of law rule contained in Section 3 of the Customary Law and Primary Courts Act superceded Section 13 of the Customary Marriages Act.[27] On the contrary, in ***Jena v Nyemba***[28] it was held that Section 13 had not been implicitly repealed by the Legal Age of Majority Act of 1982. The decision in ***Jena v Nyemba***has also a bearing in cases of***Bennet NO v Master of theHigh Court*** and ***Chihowa v Mangwende***.[29] It was further held by Chinhengo J (as he then was) that, although property acquired by a married woman from monies earned from employment could be said to fall into the category of ***mavoko***property, it is not ***mavoko***property in the strict sense, because in traditional society it was unknown for a woman to be in employment and to earn her own money.[30]

The court took notice of the fact that changes are taking place rapidly in society. Society is no longer stagnant and is dynamic while customary law seems to be conservative. There has been a lot of rural to urban migration after independence. Government policy of women emancipation has resulted in a lot of women in Zimbabwe going to school. A good number of women are highly enterprising. Some are highly educated and professionally qualified and even earn good remunerations from their work place. They equally pool their resources with men and can buy anything which men can. As a result Chinhengo J (as he then was) held that property acquired by a married African woman means of monies earned from her employment or from other productive activities by her can now be owned by her in her own right. The court further ruled

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[25] ***Jena v Nyemba*** 1986 (1) ZLR 138 (S) 1992 (2) ZLR 321
[26] ***Mujawo v Chogugdza*** 1992 (2) ZLR 321
[27] Ibid
[28] ***Jena v Nyemba (****supra)*
[29] ***Bennet NO v Master of The High Court*** 1986 (1) ZLR 127 (H) See also ***Chihowa v Mangwende*** 1987 (1) ZLR 228 (S)
[30] ***Bennet N.O v Master of the High Court*** 1986 (1) ZLR 127 (H)

that as the wife had established that the goods in issue were purchased in her own name from monies earned by her from employment, the goods belonged to her. They were not executable and had to be released.

It should be noted that subsequent to the judgement in ***The Deputy Sheriff, Harare v Mafukidze***[31] by Chinhengo, J. (as he then was) the legislature moved in. It put this matter beyond doubt by repealing Section 13 of the Customary Marriages Act.[32] Section 7 of the Administration of Estates Amendment Act 6 of 1997 was introduced.[33] The effect of this amendment is that a woman married under the Marriage Act can own property in her own right. Part II of the Customary Law and Local Courts Act was brought into effect by the Administration of Estates Amendment Act.[34] This is because customary law did not recognize a claim by a woman for sharing of matrimonial property. Under customary law everything a woman works for belongs to the husband and upon termination of the relationship, she leaves with nothing except any little items that she may have falling under the category of ***mavoko (impahlazezandlazake).*** General Law on the other hand, while it did not recognize an unregistered customary law union recognizes [albeit indirectly, through common law principles such as "unjust enrichment" and "tacit universal partnership"] the woman's right to claim equitable distribution of the property following termination of the union.

In ***Matibiri v Kumire***[35] the parties were married under customary law. The union was dissolved under customary law after 11 years. The plaintiff and the children moved out of the matrimonial home. Plaintiff claimed a share in the house. Her basis of the claim was that she had directly and indirectly made contributions to the matrimonial home. It was argued that a tacit universal partnership had come into being. It was held by Chatikobo J, (as he then was) that in any civil case between Africans, ***"unless the justice of the case so requires",***customary law applies where the parties have expressly agreed it should apply or where, regard being had to the nature of the case and surrounding circumstances, it appears

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[31] ***The Deputy Sheriff Harare v Mafukidze*** 1997 (2) ZLR 274) (H) Also ***Matibiri v Kumire*** 2000 (1) ZLR 492 (HC)
[32] The repealed Section 13 of the Customary Marriages Act [Chapter 5:07]
[33] Section 7 of the Administration of Estates Amendment Act 6 of 1997
[34] Part II of the Customary Law and Local Courts Act [Chapter 7:05]
[35] ***Matibiri v Kumire*** (*supra*)

either that the parties have agreed that customary law should apply or that it appears just and proper that it should apply. There was no evidence from which the court could draw an inference that the parties had agreed that customary law should apply.

It was also held by the learned judge that plaintiff's claim was not recognizable at customary law. As a result plaintiff had no remedy under customary law. It was further held that if the application of customary law did not conduce to the attainment of justice, the common law was to apply. The learned Judge noted that the situation prevailed since 1891 up to present time. It was further held that it must be shown that customary law applies to the dispute, and it must be just and proper that customary law should apply. Where customary law is found to be inapplicable to the decision of any matter in controversy, the general law must apply.

In ***Marange v Chiroodza***[36] the issue of choice of law arose were the parties were "married" in terms of an unregistered customary law union which had terminated. The parties were no longer staying together at the time of the suit. The issue was about which law should apply in the distribution of their estate. It was held by Makarau, J (as she then was) that the distribution of such an estate should be decided by general law principles instead of customary law. She pointed out that to apply customary law to the distribution of such an estate will be to perpetuate an injustice and to discriminate against African women who choose to marry according to custom. The basis of the ruling is the consideration of socio-economic factors affecting the parties. The judge noted that assets of the divorced parties may invariably include the distribution of rights in land or immovable property. Such rights amount to private ownership. It is however trite law that customary law has no concept of private ownership of immovable property. As a result the court noted that it has been accepted as a settled position in that customary law principles do not apply in this respect. By such reasoning Makarau J (as she then was) noted that where the distribution of the estate of persons in an unregistered customary marriage includes the distribution of rights, title and interests in immovable property, customary law is clearly not applicable in our law. She cited also ***Dokotera v The Master and Others*** and ***Mashingaidze v Mashingaidze***.[37]

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[36] ***Marange v Chiroodza*** 2002 (2) ZLR 171 (H)

[37] ***Dokotera v The Master and Others*** 1957 R & N 697 (SR); 1957 (4) SA 468 (SR) See also ***Mashingaidze v Mashingaidze***1995 (1) ZLR 219 (H)

In ***Chivise v Dimbwi***[38] the question arose as to the applicable law to follow on the distribution of the matrimonial property after a customary law marriage has been terminated.

The court rightfully conceded that decisions by the superior courts in this regard have caused confusion that can only be resolved by legislative intervention. This is because the issue has dogged the courts for quite some time. There is no settled position which has emerged from various decisions handed down by both the high court and supreme court.

In ***Feremba v Matika***[39] Makarau JP (as she then was) gave direction as to the choice of law considerations to be followed. These choices of law considerations are listed in Section 3 of the Customary Law and Local Courts Act.[40] It was held that when the general law is the correct choice, a recognized cause of action must be pleaded such as unjust enrichment, tacit universal partnership or joint ownership. It therefore follows that an averment merely to the effect that the parties were in an unregistered customary union is not sufficient to found a cause of action at general law. Such an averment can therefore not stand on its own. It is therefore clear from the judgment that more is needed to justify a departure from customary law to general law. It does not automatically suffice that general law should apply without advancing any reason in support.

While some of the judgements on the choice of law should be applauded, challenges still exist on this aspect of the law. It is apparent that there is confusion in regard to choice of law applicable in distribution of property acquired during an unregistered customary law union. The confusion and conflict has created uncertainty in the law. There is therefore need for legislative intervention to clear the confusionin the law as alluded above.

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[38] ***Chivise v Dimbwi*** 2004 (1) ZLR 12 (H)
[39] ***Feremba v Matika*** 2007 (1) ALR 337 (S)
[40] Section 3 (1) of the Customary Law and Local Courts Act [Chapter 7:05]

CHAPTER 5

Divisions of Law

5.0 Branches of law

(i) Public and Private Law
(ii) Substantive and Procedural Law
(iii) Criminal and Customary Law[1]

A description of some of the divisions of law are briefly discussed below.

5.1 Public law

Public Law (***iuspublicum)*** is that branch of the law which governs relationships between individuals and the government.[2] It includes constitutional, administrative and criminal law. Public law affects society as a whole while private law affects individuals, families, business and small groups.

5.1.1 Constitutional law

Constitutional Law is the body of law which defines the relationship of different entities within a state namely the executive, the legislature and judiciary. The Constitution is the supreme law of a country.[3] It defines and governs the powers of the Presidency, Parliament, Ministers, Judiciary, Prisons and Correctional Services, the Prosecutor – General, the Attorney - General, Local Authorities and governing bodies. Most of

[1] Madhuku, L (2010) ***An Introduction To Zimbabwean Law*** Weaver Press Harare pages 39 - 42
[2] Hahlo, H.R and Kahn, E (1968) ***The South African Legal System And Its Background*** Juta and Company Limited Wynberg pages 117 - 118
[3] Section 2 of the Constitution of Zimbabwe

the Constitutions are written but some, e.g. the British Constitution, are not. The Constitution of Zimbabwe provides, among other provisions the following.

(a) Fundamental bill of rights
(b) Citizenship
(c) The public service and defence forces.
(d) General elections
(e) The administration of government finances
(f) Appointment of judges
(g) The office of the President
(h) Parliament

Constitutional law deals with the structure and broad rules while the details of running and maintaining the various functions is provided by administrative law.[4] In other words constitutional law deals with the fundamental principles by which the government exercises its authority.[5] In some instances, these principles confer or grant specific powers to the government, e.g. the power to tax employees and businesses and spend for the welfare of the population.[6] In addition, constitutional law lays down and guides the duties and powers of the government, and the duties and rights of its citizens and residents.

5.1.2 Administrative law

Administrative law can be described as that law which determines the organization, powers and duties of administrative authorities.[7]

Constitutional law confers powers which are defined by administrative law. Administrative law is implemented by administrative authorities

[4] Hahlo and Kahn ***op cit*** note 2 pages 117 - 118
[5] Ibid
[6] Ibid Resources Foundation Harare page 13
[7] Feltoe, G. 2006 ***A Guide To The Administrative and Local Government Law in Zimbabwe*** Fourth Edition Legal

for example the Rent Board, the Liquor Licencing Board, the Censorship Board, the Forestry Commission, etc.

Administrative law is also defined as the body of law that governs the activities of administrative agencies of government.[8] Government agency action can include rule making, adjudication or the enforcement of a specific regulatory agenda. Such agencies are delegated power by statutes.

5.1.3 Criminal law

Reynolds, describes criminal law as the law relating to crime. It protects members of society from those who wrong the community by committing crimes.[9] A crime is an unlawful act or conduct generally accompanied by a blameworthy state of mind, that is an ***actusreus***and ***mens rea.***[10]

A person convicted of a crime is liable to the courts.[11] The court will take into account mitigating and aggravating factors before deciding on the punishment to impose although in some cases there are mandatory sentences which the court must impose in the absence of special circumstances.[12]

Criminal trials are held in open court unless the accused is a juvenile when the trial is held *in camera*.[13] In Zimbabwe children under the age of seven years are presumed ***doliincapax***.This refers to a presumption that such children are incapable of committing a crime under legislation or common law.[14] In other words the children are presumed to be incapable of forming ***mensrea***as they do not have a sufficient understanding between "right and wrong". The victim friendly courts are used when the witnesses are presumed to be vulnerable.[15] This is especially in the case with survivors of sexual offences such as rape and aggravated indecent assault. This is meant to protect the vulnerable witnesses.[16]

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[8] Ibid
[9] Reynolds, DA (1983) ***An Introduction to Law*** Ministry of Justice Harare pages 43 -46
[10] Ibid
[11] Ibid Hahlo and Kahn ***op cit*** note 2 page 119
[12] Feltoe, G (2008) ***Magistrates' Handbook*** Legal Resources Foundation Harare pages 147-150
[13] Madhuku ***op cit*** note 1 page 118
[14] Feltoe, G (2004) ***A Guide to the Criminal Law of Zimbabwe*** Third Edition Legal Resources Foundation Harare page 32
[15]***The Victim Friendly System Brochure*** – 14 June 2011. FH10 - MHPSS
[16]***The Protocol on the Multi – Sectoral Management of Sexual Abuse and Violence in Zimbabwe***. Judicial Service Commission 2012 pages 15 - 20.

In Zimbabwe an accused person is presumed innocent until provenguilty.[17] In criminal trials the prosecution is required to prove its case beyond reasonable doubt and if it fails to do so the accused person should be acquitted.[18]

There is no onus on the accused to prove his innocence although some statutes provide for presumptions against an accused in certain circumstances.

5.2 Private law

Private law is that part of a civil law legal system which is part of the ***jus commune*** that involves relationships between individuals.[19]

It includes the laws of persons, property, succession, obligations, contract, delict and commercial law. It governs the relationship between individuals, enforcing and maintaining their rights against each other.[20]

The State is not directly concerned with the relationships between husband and wife, parent and child and the various contracts between real and artificial persons.

5.2.1 The law of persons

The term "persons" include artificial persons such as companies.[21] The legal capacity of natural persons is important as this has a bearing on their ability to enter into or enforce obligations. The law of natural persons in Zimbabwe regulates the birth, private law status and the death of a person.[22] It determines the requirements and qualifications for legal majority status. It also defines the rights and responsibilities attached to natural persons.

Legal capacity is determined by age, sex, nationality, domicile and legitimacy. The legal age of majority is eighteen years.[23] Minors have

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[17]Feltoe ***op cit*** note 14 pages 3 - 4
[18]Ibid Reynolds ***op cit*** note 9 page 46
[19]Hahlo and Kahn ***op cit*** note 2page 120
[20]Hahlo and Kahn ***op cit*** note 2 page 120
[21]Reynolds ***op cit*** note 9 page 46
See also Cronje, DSP and Heaton J. ***The South African Law of Persons*** Butterworths Durban page 1
[22]Reynolds ***op cit*** note 9 pages 46 to50
[23]Ibid

limited rights but can act through their parents or legal guardians except with regard to marriage.

They can own property which can be managed by the parents or legal guardians.[24] They can be sued or sue but should also be assisted by a parent or legal guardian. The law of persons includes Family Law.

5.2.2 The law of property

The law of property relates to real rights in both movable and immovable property.[25] Movable property means things whose ownership can be transferred by delivery. A person usually has to be conferred with the rights, interest and title for a property to be transferred. Only a registered legal practitioner who is also a registered conveyancer can transfer an immovable property. Not all legal practitioners are conveyancers.[26] All conveyancers must however be registered legal practitioners. They must be registered with the High Court of Zimbabwe. They must also have a valid practicing certificate for the current year issued by the Law Society of Zimbabwe. Certain things cannot, however, be owned by anyone because they are communal.[27]

There are certain real rights which are benefits enjoyed by one person over the property of another. A person can, for example, have a right to use a road which passes through a farm belonging to another. This is known as a servitude. This right is limited to the use of the road in a normal way without detracting the value of the property.[28] A mortgage is also a right which one person has over immovable property of another pending repayment of a loan.[29] The most obvious example is the mortgage bond over a house where a building society advances money for the purchase of a house and in return is given title deeds as security. The title deeds are only released to the purchaser upon full payment of the loan.

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[24] Ibid
[25] Reynolds ***op cit*** note 9 page 50
[26] The Legal Practitioners Act [Chapter 27:07]
See also Mhishi, L.M. (2005) ***The Law and Practice of Conveyancing In Zimbabwe*** Legal Resources Foundation Harare
[27] Clark, A and Kohler, P 2006 ***Property Law Commentary and Material*** New College Oxford
[28] Reynolds ***op cit*** note 9 page pages 51 - 52
[29] Ibid

5.2.3 The law of succession

This is the law which defines and governs what happens to the estate of a deceased person.[30] Where there is a valid will the property will be distributed according to the contents of the will.[31] Where a person dies ***ab intestate*** (i.e. without a will) the law provides for the handling of their estate according to their race or nationality.[32]

The law of succession in Zimbabwe has gone through transformation since attainment of independence. The law of intestate succession has been reformed.[33] The customary laws of succession, which previously governed the estates of the vast majority Africans, have now been largely abolished and replaced by a series of principles which favour the surviving spouse and children of the deceased and concentrate inheritance rights within the nuclear patrilineal family. This has been done through the enactment of the Administration of Estates Amendment Act of 1997. Section 3 replaces Section 68 of the Administration of Estates Act.[34]

5.2.4 The law of obligations

The law of obligations is one branch of private law under the civil law legal system. It is the body of the rules that organizes and regulates the rights and duties arising between individuals. An obligation is basically a legal requirement by law, contract or as a result of unlawful harm caused to the person or property of another.[35] In other terms the law of obligations deals with personal rights held against specific persons and arising out of contract or delict.

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[30] Ibid
See also The Journal of African Law 1998 School of Oriental and African Studies Volume 1 Number 1 Cambridge University Press
[31] Ibid
[32] Reynolds ***op cit*** note 9 page 53
[33] Journal of African Law "***Succession Law Reform In Zimbabwe***" Volume 42 Number 1. 1998
[34] The Administration of Estates Act [Chapter 6:02]
[35] Reynolds ***op cit*** note 9 page 53

5.2.5 The law of contract

According to Kahn, E[36] a contract is;

> "*an agreement by which two parties reciprocally promise and engage one of them singly promises and engages to the other to give some particular thing or to do or abstain from doing some particular act."*

The general principles of the law of contract form an indispensable foundation for business law in Zimbabwe. The law of contract is woven into and is inseparable from every form of business activity.[37] Contracts are enforced because it is morally right and commercially sound to do so.

For a contract to be valid there must be an offer and an acceptance of what is offered. The minds of the parties must be set on the same thing.[38] The law only recognizes contracts which are lawful and so an unlawful contract is void. A contract is fulfilled by performance as per agreement.[39]

5.2.6 The law of delict

A Delict, from the latin word ***delictum***is a term in civil law jurisdictions for a civil wrong consisting of an intentional or negligent breach of duty of care that inflicts loss or harm.[40] This loss or harm triggers legal liability for the wrongdoer. The law of delict deals with duties owed to another and compensation or restitution consequent upon a breach thereof.

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[36] Kahn, E (1971) ***Contract and Mercantile Law*** Juta and Company page 21
[37] Reynolds ***op cit*** note 9 pages 53 - 54 Also Volpe, P ***Commercial Law of Zimbabwe*** ZLJ Paperback page 221
[38] Christie, R.H (1998) **Business Law In Zimbabwe** Juta and Company Ltd Claremont page 33
[39] Willie, G and Millin, P 1967 ***Mercantile Law of South Africa*** Sixteenth Edition Hortors Limited Johannesburg pages 109 - 110
[40] Also Feltoe, G (2006) ***A Guide to Zimbabwean Law of Delict*** Legal Resources Foundation Harare pages 17 – 18

There must be a ***causal nexus*** (i.e. a link) between the wrongful act and the injury sustained.[41] A person can only be liable for the reasonably foreseeable consequences of his wrongful as noted by Feltoe.[42] In Zimbabwe the foreseeability test is used in preference to the direct consequences of wrongful act. The foreseeability test is also known as the reasonable man test. It is a two tier test applied as follows;

(a) "would a reasonable man have foreseen the danger in question? and
(b) if so would he have avoided the danger?"[43]

If the answers to both questions are in the affirmative then the wrongdoer is liable to compensate the injured party.

5.3 International law

International law or the law of nations (***iusjentium)*** is described as;"that body of law which is composed for its greater part of the principles and rules of conductwhich states feel themselves bound to observeand therefore, do commonly observe in theirrelations with each other."[44] In other words it is a setof rules generally regarded and accepted as binding in relations between states and between nations. It serves as a framework for the practice of stable and organized international relations.

5.3.1 Public International law

It governs the relations between countries, international organisations and institutions. The ruleswhich form public international law are found in treaties and conventions.[45]

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[41] Reynolds ***op cit*** note 9 pages 57-58 See also Redgment, J 1981 ***Introduction to the Legal System of Zimbabwe*** University of Zimbabwe Harare pages 63 - 64
[42] Feltoe ***op cit*** note 40 page 31
[43] Reynolds ***op cit*** note 9 page 59
[44] Hahlo and Kahn ***op cit*** note 2 pages 111 -112
[45] Ibid

At times it is not easy to enforce the rules should a country be found to have breached the law.

The sources of international law are stated as;

(i) International custom
(ii) International conventions and treaties
(iii) General principles of law recognized by civilized nations and
(iv) Judicial decisions and writing of leading jurists.[46]

The principles of public international law are binding on those countries which have ratified the charter.[47]

5.3.2 Private international law

This is the law which deals with the handling of disputes between persons, natural or artificial, involving two or more legal systems.[48] It is part of the law of a country and has been referred to as conflict of laws because no two legal systems are identical.[49]

Private International Law relates to different conflicting laws and the decision as to which law to apply in a particular case.[50] The court before which a case is pending is the one which has to decide which of the two conflicting laws to apply in a given case guided by existing law including foreign judgments.

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[41] Reynolds ***op cit*** note 9 pages 57-58 See also Redgment, J 1981 ***Introduction to the Legal System of Zimbabwe*** University of Zimbabwe Harare pages 63 - 64
[42] Feltoe ***op cit*** note 40 page 31
[43] Reynolds ***op cit*** note 9 page 59
[44] Hahlo and Kahn ***op cit*** note 2 pages 111 -112
[45] Ibid
[46] Hahlo and Kahn ***op cit*** note 2 page 112
[47] Hahlo and Kahn ***op cit*** note 2 pages 111- 112
[48] Redgment ***op cit*** note 41page 48 Also ***Jirira v Jirira and Another*** 1976 (1) RLR 7 Also Bennet W "***African Law of Wills***" 1978 (2) R.I.J
[49] Reynolds ***op cit*** note9 pages 61 - 63
[50] Ibid

Private International Law is also defined as the legal framework composed of conventions, protocols, model laws, legal guides, uniform documents, case law, practice and custom as well as other instruments which regulate relationships between individuals in an international context.[51] Conflict of laws and Private International Law are terms used interchangeably. They simply concern relations across different legal jurisdictions between persons and sometimes companies, corporations and other legal entities.

[51] Redgment ***op cit*** note 41 page 48

CHAPTER 6

Parliament Role, Structure and Law Making Process

6.0 Role, structure and the law making process

6.1 The role and function of parliament

6.1.1 Introduction

In some countries such as Zimbabwe parliament is the group of people who make the laws of the country.[1] It is the equivalent of Congress in the United States.[2] In the United Kingdom Parliament is the highest legislature, consisting of the sovereign, the House of Lords and the House of Commons.[3]

Parliament is also defined as a representative body having supreme legislative powers within a state or multinational organisation.[4] It has effective power and is one of the three pillars of government which include the Executive and Judiciary.[5]

Universally, the role of any parliament may be generally described as legislative, representation and oversight in nature as well as judicial to some extent.[6] This mandate is derived from the constitution which is the

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[1] Madhuku, L (2010) ***An Introduction To Zimbabwean Law*** Weaver Press Harare pages 44 – 45

[2] Taylor–Butler(2008) ***The Congress of the United States American History***Children 's Press (CT) pages 1 - 4
See also Kaiser, F.M, ***Congressional Oversight***, Order Code 97 – 93 Gov. also Home, A et al (2013) ***Hart Studies In Constitutional Law, Parliament and The Law*** Hart Publishing Oxford pages 2 - 5

[3] Rodgers, R and Walters, R (2006) ***How Parliament Works*** Sixth Edition Paperbacks pages 1 – 4

[4] Redgment, J (1981) ***Introduction to the Legal System of Zimbabwe*** Belmont Printers Bulawayo pages 33 – 34

[5] Ibid

[6] ***Parliament of Zimbabwe Member's Induction Manual*** 2013 page 2 (herein after referred as the Manual)

supreme law of the country.[7] The core values and functions of parliament have evolved over millennia. Some of these roles chiefly comprise legislation, consent to taxation, control of public expenditure, debate on government policy and scrutiny of government administration.[8]

Pursuant to the need to enhance good governance systems the Zimbabwean Parliament is now actively involved in the selection and appointment of the members of independent Constitutional Commissions such as the Gender Commission and Human Rights Commission.[9] This stems from the fact that one of the most celebrated tenets of the new Constitution of Zimbabwe makes provision in Chapter 12 for independent commissions to support democracy.[10] Interviews of shortlisted candidates are held in public.[11] Parliament's committee on Standing Rules and Orders invites interested members of the general public, diplomats accredited to Zimbabwe and all civic society organisations to witness the interviews.

The Legislature has the power to amend the Constitution and to make laws for the peace, order and good governance of Zimbabwe.[12] According to Bradley, A.W and Ewing, K.D[13] the fundamental principle of democratic government is that there should be an elected assembly representing the people. This assembly should have the role and authority to make laws that apply to the entire population. Parliament is vested with the supreme authority to promote democratic governance in the country.[14] Of paramount importance is that Parliament has the role to ensure that the state and all institutions and agencies of government at every level act constitutionally and in the national interest of Zimbabwe.[15] The common denominator in all progressive constitutions in the world provides that parliaments have a broad mandate to make laws that enhance governance systems. Although the wording may be different from country to country the ultimate mandate of parliament remains the same. The most prominent role of parliament is the legislative function.[16]

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[7] Section 2 of the Constitution of Zimbabwe
[8] Madhuku ***op cit note 1*** pages 44 - 46
[9] Ibid
[10] Ibid
[11] Section 237 (c) of the Constitution of Zimbabwe
[12] Section 117 2 (a) – (b) of the Constitutionof Zimbabwe
[13] Bradley, A.W and Ewing, K.D. (2011) ***Constitutional And Administrative Law*** Fourteenth Edition Longman London
[14] Section 119 (1) of the Constitutionof Zimbabwe
[15] Section 119 (2) – (3) of the Constitutionof Zimbabwe
[16] ***Op cit*** note 6 page 3

6.1.2 The Legislative Role

To legislate is to make or enact laws.[17] Legislative authority refers to the function of making laws by the President and the August House commonly referred to as Parliament.[18] The laws are aimed at governing parties and transaction made by the general public. This implies that the law binds and governs every person, natural or juristic as well as all State institutions and organs of the government.

Parliament exercises its legislative role by exercising its supremacy through the passing of bills. A bill may therefore originate from the Senate or National Assembly unless otherwise explicitly stated.[19] A House where a bill is initiated is referred to as the House of Origin.[20] Parliament has the power to initiate, prepare, consider or reject any legislation. The role of Parliament is therefore fundamental in that it should not just rubber stamp bills. The two Houses should thoroughly interrogate bills through meaningful debate so that they do not infringe on the bill of rights. The bills must be constitutional and address matters of national interest. Parliament in other words is obliged to scrutinise bills so that there is value addition.[21] A bill finally becomes law or an Act once it has been presented and passed in both Houses of Parliament and assented to by the President of the Republic of Zimbabwe.[22]

6.1.3 The Oversight Role

Oversight refers to the role of Parliament of controlling the public's financial resources.[23] It also refers to the function and exercise of Parliament's inherent powers which incorporate the review, monitoring and supervision of operations and activities of the Executive.[24]Historically the traditional Westminster view on oversight, as inherited by many former British colonies, was rather adversarial.[25]

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[17] Manual ***op cit*** note 6 page 4
[18] Ibid
[19] Ibid
[20] Manual ***op cit*** note 6 pages 4 - 5
[21] Manual ***op cit*** note 6 page page 5
[22] Section 131 (6) (b) of the Constitutionof Zimbabwe
[23] Manual ***op cit*** note 6 page page 5
[24] Ibid
[25] Ibid

In some instances oversight was professed to be the purview of opposition politicians and not the legislature as an institution.[26]

Oversight function entails the informal and formal, watchful, strategic and structured scrutiny exercised by the legislature in respect of the implementation of laws, the application of the budget and the strict observance of the constitution and statutes.[27] Oversight role is supported by a variety of authorities such as the Constitution, public law and chamber and committee rules. It is an integral part of the system of checks and balances between the legislature and executive to ensure best practices. Oversight therefore extends to the monitoring of the performance of all government departments including those at provincial and local government levels.[28] Standing Orders of Parliament categorically make clear the roles of the portfolio committees in respect of oversight.

In summary it is important to note that Parliament, through its committee system, monitors all government programmes to ensure efficient use of national resources. Individual members, through the Question Time in Parliament can raise any matter of public policy.[29] Those summoned to appear before portfolio committees should do so and answer questions honestly. Contempt charges can be preferred against those who deliberately refuse to appear before the relevant portfolio committees or refuse to answer questions. Members of Parliament can also move motions that relate to areas of their interest that require response from a Vice President or a relevant Minister or Deputy Minister.[30]

It is also important to note that in a constitutional democracy such as Zimbabwe, the Executive though a powerful organ of the State is in principle accountable to Parliament as a body elected to represent the will of the people. It is Parliament's duty to deliberate on and pass laws, to scrutinize government performance and to make the Executive effectively accountable for the manner it initiates and implements public policies and programmes.

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[26] Ibid
[27] Ibid
[28] Ibid
[29] Manual ***op cit*** note 6 page 6
[30] Ibid See also Dicey, A.V. (1889) ***Introduction To The Study of the Law of the Constitution*** Oxford Section 3 (2) (e) of the Constitution

Parliament must however not seek to govern because this is the duty of the Executive.This is in line with the doctrine of separation of powers as enunciated in the Constitution and by Dicey, A.V.[31]

6.1.4 The Representative Role

To represent is to act for and on behalf of some other part or estate. As elected and appointed officials Members of Parliament are the voice of the electorate or constituency. They are expected to speak for and air views of those who elected them to power.[32] They are expected to represent the aspirations of the electorate and engage in debates that give prominence to the wishes and will of citizens. The representation role of Parliament stems from the fact that the majority of Members in both Houses are directly elected into office. Members of Parliament play a pivotal role in raising constituency issues on behalf of the electorate.[33]

6.1.5 The Judicial Role

The primary judicial function is to determine disputed questions of fact and law in accordance with the laws made by Parliament and declared by Superior Courts. In line with the tri-model doctrine of separation of powers the Judiciary has supreme authority in interpreting the law.[34] It is the judicial functions to interpret the law and apply it to the facts. The trials of alleged offenders is also a judicial function.

6.1.6 Other Different Roles

Besides the legislative roles and functions that both Houses of Parliament have in common, the Constitution allocates different roles and functions

[31] Manual ***op cit*** note 6 pages 6 – 7
[32] Manual ***op cit*** note 6 page 6
[33] Ibid
[34] Ibid

to each House. These roles are exercised by each House exclusively. They are distinct from each other.[35]

6.2 Structure of Parliament

The legislature of Zimbabwe consists of Parliament and the President acting in accordance with Chapter 6 of the Constitution.[36] Parliament consists of the Senate and the National Assembly.[37] This is a bicameral Parliament.

6.2.1 The Structure of the Senate

The Senate is the Upper House of Parliament. It consists of eighty Senators.[38] Six of the Senators are elected from each of the provinces into which Zimbabwe is divided. They are elected by a system of proportional representation conforming with the provisions of the Constitution.[39] Sixteen of the Senators are chiefs.

Two Senators are elected by the provincial assembly of chiefs from each of the provinces except the metropolitan provinces.[40] The current metropolitan provinces are the cities of Harare and Bulawayo. The President and Deputy President of the National Council of Chiefs are also Senators.[41] The Constitution also makes provision for two persons to be elected as Senators in the manner prescribed in the Electoral law to represent persons with disabilities. Elections of Senators are in accordance with Electoral law.[42] They are elected under a party-list system of proportional representation as opposed to the "First Past the Post" which literally means "winner take all". Proportional representation has its own variances.

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[35] Zvoma A. (2012) ***A Guide To The Parliament of Zimbabwe*** Parliament of Zimbabwe Harare pages 4 - 6
[36] Section 116 of the Constitutionof Zimbabwe
[37] Section 118 of the Constitutionof Zimbabwe
[38] Section 120 (1) of the Constitutionof Zimbabwe
[39] Sections 120 (1) (a) and 120 (2) of the Constitutionof Zimbabwe
[40] Section 120 (1) (b) of the Constitutionof Zimbabwe
[41] Section 120 (1) (c) of the Constitutionof Zimbabwe
[42] Section 120 (1) (d) and 120 (2) of the Constitutionof Zimbabwe

Proportional representation is based on the votes cast for candidates representing political parties in each of the provinces in the general election for members of the National Assembly.[43] It is also based on a system in which male and female candidates are listed alternatively. Every list is headed by a female candidate.[44]

The Constitution provides for the qualification and disqualifications for election as Senator.[45] At its first sitting after a general election and before proceeding to any other business, the Senate must elect a presiding officer to be known as the President of the Senate.[46] As soon as practicable after electing a President of the Senate following a general election, the Senate must elect a Senator to be the Deputy President of the Senate.[47]

6.2.2 The Structure of the National Assembly

The National Assembly is the Lower House of Parliament. It consists of two hundred and ten members elected by secret ballot from the two hundred and ten constituencies into which Zimbabwe is divided.[48] The Constitution provides that for the life of the first two Parliaments after the effective date, an additional sixty women members, six from each of the provinces into which Zimbabwe is divided are elected under a party-list system of proportional representation. This system is based on the votes cast for candidates representing political parties in a general election for constituency members in the provinces.[49]

Elections of Members of the National Assembly must be conducted in accordance with the Electoral law enacted by Parliament.[50] The fourth schedule of the Constitution provides for the qualification for registration as a voter and for voting at elections of members of the National

[43] Section120 (2) (a) of the Constitutionof Zimbabwe
[44] Section120 (2) (b) of the Constitutionof Zimbabwe
[45] Section 121 of the Constitutionof Zimbabwe
[46] Section 122 (1) of the Constitutionof Zimbabwe
[47] Section 123(1) of the Constitutionof Zimbabwe
[48] Section 124 (1) of the Constitutionof Zimbabwe
[49] Section 124 (1) (b) of the Constitutionof Zimbabwe
[50] Section 124 (2)of the Constitutionof Zimbabwe

Assembly.[51] The Constitution also provides for the qualifications and disqualifications for election to the National Assembly.[52] At its first sitting after a general election, and before proceeding to any other business, the National Assembly must elect a presiding officer to be known as the Speaker.[53] As soon as practicable after electing a Speaker following a general election, the National Assembly must elect one of its members to be the Deputy Speaker.[54]

6.3 The law making process:

Parliament derives its mandate to legislate from the Constitution.[55] The Constitution of Zimbabwe states that the legislative authority is derived from the people and empowers Parliament

(a) to amend the Constitution in accordance with Section 328.[56]
(b) to make laws for the peace, order and good governance of Zimbabwe[57]and
(c) To confer subordinate legislative powers upon another body or authority in accordance with Section 134.[58]

The detailed procedures of the legislative process are laid out in the fifth schedule to the Constitution as read with the Standing Orders.[59]

6.3.1 Types of Bills

A Bill is a proposed law that comes before Parliament.[60] There are three types of Bills namely Public Bills, Private Bills and Hybrid Bills.

[51] Section 124 (3) of the Constitutionof Zimbabwe
[52] Section (1) (a) – (b), 2 (a) – (b) and 3 of the Constitutionof Zimbabwe
[53] Section 126 (1) of the Constitutionof Zimbabwe
[54] Section 127 (1) of the Constitutionof Zimbabwe
[55] Section 117 (1) of the Constitutionof Zimbabwe
[56] Section 117 (2) (a) of the Constitutionof Zimbabwe
[57] Section 117 (2) (b) of the Constitutionof Zimbabwe
[58] Section 117 (2) (c) of the Constitutionof Zimbabwe
[59] Fifth Schedule as read with the standing orders
[60] Manual ***op cit*** note 6 pages 16 - 17

6.3.2 Public Bills

A Public Bill is one that relate to matters of public interest.[61] There are two types of Public Bill namely, Private Member's Bills and Government Bills.[62] A Private member's Bill is a Bill which is introduced by a member who is not a Government Minister.[63] The member is referred to as backbencher. A Government Bill is one, which is introduced in the House by a Government Minister.[64]

6.3.3 Private Bills

Private Bills are those Bills which affect private interests. These should not be confused with Private Member's Bills.[65] Private Bills are those, which are made to benefit the private interests of a person, group of persons, a specific private company or local authority.[66] Private Bills do not benefit the general public. Private Bills are rare. Examples include the Bill which led to the Zimbabwe Institution of Engineers (Private) Act, The Chartered Secretaries (Private) Act [Chapter 27:03] and the Hippo Valley Act [repealed in 2003].[67]

6.3.4 Hybrid Bills

A Hybrid Bill is a Bill which has elements of both Public and Private Bills in that it affects both Private and Public interests.[68] Such a bill is examined in Parliament by a combination of both Public Bill and Private Bill procedures.[69] The procedure is provided for in the standing orders.

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[61] Manual ***op cit*** note 6 pages 16
[62] Ibid
[63] Ibid
[64] Ibid
[65] Ibid
[66] Private Bill Procedure Act [Chapter 2:07]
[67] The Zimbabwe InstitutIon of Engineers (Private) Act [Chapter 27:16] and The Chartered Secretaries (Private) Act [Chapter 27:03]
[68] Manual ***op cit*** note 6 page17
[69] Ibid

6.4 Stages of a Bill

The stages or passage of Bills refers to the various stages a Bill must go through before it becomes law. These main stages are as follows[70]:

- Referral to Portfolio Committees
- First Reading
- Referral to the Parliamentary legal committee
- Second Reading
- Committee stage
- Report stage
- Third Reading
- Transmission of Bills to the next House or Second Chamber
- Authentication by the Clerk of Parliament
- Presidential Assent

6.4.1 Publication in the Government Gazette

Bills can be introduced from any of the two houses. Any Member of Parliament can initiate any Bill, save for, a Money Bill which can only be introduced by a Minister or Deputy Minister.[71]

The Standing Orders require that a Bill, other than a Constitutional Bill be published in the Government Gazette before it is introduced in the House.[72] Gazetting is a formal way of informing the Public of the Bill as a way of soliciting their views on the proposed legislation. Fourteen days have to lapse before an ordinary Bill can be introduced.[73] Thirty days have to lapse before a Constitutional Bill can be introduced.[74] Subject to Standing Order 104, not more than one stage of a Bill shall be taken at the same sitting without the leave of the House.[75]

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[70] Ibid
[71] Zvoma ***op cit*** note 35 page 64
[72] Manual ***op cit*** note 6 page 17
[73] Ibid
[74] Ibid
[75] Ibid

6.4.2 Referral to Portfolio Committees

Upon gazetting, a Bill is automatically referred to the relevant Portfolio Committees. Committees are expected to consider the provisions of the Bill. They may also conduct Public Hearings as a way of engaging stakeholders in the legislative Process.[76] The Committee then prepares a report, which is then presented to Parliament during the Second Reading stage. The Constitution now requires Parliament to ensure that interested parties are consulted on bills before Parliament.[77]

6.4.3 First Reading

This is the formal introduction of the Bill of Parliament. The Minister reads the long title of the Bill. This is the first reading, which is no more than a formality.[78] There is no debate at this stage.[79]

Any Bill other than a Money Bill may be introduced in either House. Money Bills can only be introduced in the House of Assembly.[80]

6.4.4 Referral to the Parliamentary Legal Committee

Once a Bill has been read for the first time, it is automatically referred to the Parliamentary Legal Committee with the exception of a Constitutional Bill. When the Legal Committee receives proposed legislation, its task is to examine the Statutory Instrument or Draft Statutory Instrument. This is in order to ensure that no part of the proposed legislation infringes or violates the Declaration of Rights to any other provisions of the Constitution.[81] The Legal Committee must examine all proposed Legislation save for Money Bills or Bills which amend the Constitution.

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[76] Ibid
[77] Ibid
[78] Manual ***op cit*** note 6 page 18
[79] Ibid
[80] Paragraph 2 (2) of Part 1 of the Fifth Schedule of the Constitution of Zimbabwe
[81] Manual ***op cit*** note 6 page 18

The Parliamentary Legal Committee considers the provisions of the Bill and report to the House within twenty six business days.[82] The report should state whether any part of the examined legislation would infringe the Declaration of Rights if it were to become law. If the Committee determines that the proposed law or any part thereof indeed contravenes the Constitution, its written report must contain reasons explaining the conclusion arrived at. In terms of the Constitution a Constitutional Bill is not referred to the Parliamentary Legal Committee.[83] In respect of either Bills the Legal Committee may issue an adverse or non-adverse report. Parliament is obliged to consider an adverse report by the Committee. It, however, has the discretionary power to accept or reject the Legal Committee's report.[84] It is Parliament that ultimately decides whether a provision in a Bill or Statutory Instrument contravenes the Constitution. If the House rejects the Parliamentary Legal Committee report or the report is non-adverse, the Bill proceeds to second reading. If the House adopts the adverse report then the Bill falls away.[85]

6.4.5 Second Reading

If the Bill or Statutory Instrument does not receive an adverse report or has been amended and passed by the Legal Committee in its amended form, it proceeds to be read a second time.[86] This is the Second Reading. Usually the Second Reading is done after reasonable time has been given to the members to study the Bill. At the Second Reading the person who introduced the Bill, usually a Government Minister explains the principles of the Bill. The meaning and purpose of the Bill is fully explained.[87] The respective portfolio committee then presents its report. Members of the House of Assembly debate the Bill in great detail.[88] A debate is a formal discussion or argument. During the debate members will either support or attack the Bill. Amendments to the Bill itself may not be proposed

[82] Ibid
[83] Section 152 (2) (a) of the Constitution of Zimbabwe
[84] Manual ***op cit*** note 6 page 18
[85] Ibid
[86] Ibid
[87] Ibid
[88] Ibid

during the Second Reading. Debate is confined to the principles of the Bill. When debate has been concluded the Bill is read the Second Time.

6.4.6 Committee Stage

At the end of the debate, the House resolves itself into a Committee of the whole House.[89] This is referred to as the Committee Stage. At this stage the President of the Senate or the speaker as the case may be, leaves the chair and a chairperson who has to be a member of the President of the Senate or Speaker's panel assumes the chair.[90] The Bill is examined in detail, clause by clause. Every clause must, either be accepted, amended or rejected.[91] It is permissible at the Committee Stage to amend the Bill. No amendment that is in conflict with the principle of the Bill as read the second time may be accepted. The amendments must appear on the Order Paper at least a day before the Committee Stage.

6.4.7 Report Stage

At the end of the Committee Stage discussions (i.e after the House, sitting as a Committee, has completed its work), the chairperson reports the Bill with or without amendments to the House. If the Bill is reported with amendments, it is referred to the Parliamentary Legal Committee which should consider them within six business days and report back to the House.[92] The reports of the Legal Committee given at this stage are treated in the same manner as those presented when the Bill was first presented. If no amendments are made at the Committee Stage the Bill is set for the Third Reading. If however, the Legal Committee's report is adopted the Bill is set for reconsideration by the House.[93] After consideration the Bill is set for the Third Reading.

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[89] Ibid
[90] Ibid
[91] Ibid
[92] Manual ***op cit*** note 6 page 19
[93] Ibid

6.4.8 Third Reading

When the Bill is back with the House it is, on an appointed day, read a third time. This is the Third Reading. After being read the third time the Bill is deemed to have been passed by the National Assembly.[94] The Stage marks the last significant stage of the Bill in the House. The third reading is also formality where no debate takes place.[95] In the case of Constitutional Bills, the Bill has to be passed by a two- thirds majority of the total membership of that House.[96] The presiding officer certifies that the Bill has received the required number of affirmative votes before it is transmitted to the next House.

6.4.9 Transmission of Bills to the next House/Chamber

Once the Bill has been passed by the House of Origin it is transmitted to the other House where it will go through all the stages commencing with the Second Reading.[97] In the case of Money Bills the Senate has no power to amend the Bill. This signifies that the Bill has been passed by Parliament and then awaits Presidential Assent. It becomes an Act upon Assent by the President.[98]

6.4.10 Authentication by the Clerk of Parliament

Once a Bill has been passed by both Houses it is authenticated by the Clerk of Parliament before it is presented to the President for Presidential Assent.[99] Authentication is a process to verify that the Act is a true reflection of what transpired in Parliament.[100]

[94] Ibid
[95] Ibid
[96] Ibid
[97] Ibid
[98] Ibid
[99] Ibid
[100] Ibid

6.4.11 Presidential Assent

Assuming that the Bill is in order (i.e. it has been passed by both houses/ chambers) the next stage is Presidential Assent. When the Bill has been duly passed in terms of the provisions of the Constitution and the Standing Orders, the authenticated Bill is transmitted to the President for assent.[101] The Presiding officer is supposed to give notice on the date on which the Bill was presented to the President.[102]

Upon being presented with the authenticated Bill the President is required to assent or withhold his assent within twenty one days in terms of the Constitution.[103] Where the President considers the Bill to be unconstitutional he shall return it to Parliament together with detailed reasons.[104] The speaker shall without delay cause the National Assembly to be convened. The National Assembly has the option to reconsider and fully accommodate the President's concerns to pass the Bill with or without amendment by two thirds majority.[105] In each case the Speaker is to cause the Bill to be presented to the President.

The President must append his signature if his concerns are fully accommodated, sign it even if he still has reservations or refer the Bill to the Constitutional Court for advice on its constitutionality.[106]

If the constitutional court advises that it is constitutional the President must assent to the Bill and sign it to be published in the Gazette. The Act of Parliament shall come into operation on the day of its publication in the Government Gazette unless some other date has been provided for under that or some other Act of Parliament.[107]

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[101] Ibid
[102] Ibid
[103] Section 131 (6) (a) of the Constitution of Zimbabwe
See also ***op cit*** note 6 page 19
[104] Section 131 (6) (b) of the Constitution of Zimbabwe
See also***op cit*** note 6 page 19
[105] Section 103 (7) (a) of the Constitution of Zimbabwe
[106] Section 131 (6) (b) of the Constitution of Zimbabwe
[107] Manual ***op cit*** note 6 page 20

6.4.12 Disagreement between the Senate and the National House of Assembly

A disagreement arises when the two Houses cannot agree on amendments made in either House or where the Senate rejects or fails to pass a Bill which originated in the National Assembly within ninety days.[108] In the event of there being a disagreement the course of action to be taken depends on whether the Bill in question is an ordinary Bill or Constitutional Bill.

In the case of an Ordinary Bill, the Constitution provides that the disagreement shall be resolved within ninety days, failing which the National Assembly may resolve by a majority of its total membership that the Bill be submitted to the President for Assent in the manner in which it was passed by the National Assembly or including changes they would have agreed on.[109]

In case of a Constitutional Bill, the period allowed to resolve the disagreement shall be one hundred and eighty days.[110] The resolution to present the Bill for Presidential Assent shall be made by the affirmative vote of two thirds of the total membership of the National Assembly.[111]

[108] Ibid
[109] Ibid
[110] Ibid
[111] Ibid

CHAPTER 7

The Courts Roles And Structure

7.0 The Roles of the Courts

Zimbabwe ushered in a new Constitution in 2013. This was of major significance to the legal and justice delivery system.[1] The adoption of a new Constitution of Zimbabwe in March 2013 replaced the Lancaster House Constitution as the new supreme law to be applied in all the courts and to be observed by all the people. The new Constitution also reshaped the judiciary.[2]

Courts in Zimbabwe play a pivotal role in dispute resolution.[3] This stems from the fact that conflict is an integral part of human interaction, be it at the workplace, in the domestic sphere or in society generally. The central question is how it is managed. Its management calls for the establishment of disputes settlement mechanisms that are credible, efficient and accessible for fair and balanced outcomes between the parties. Efforts at voluntary settlement of disputes may failand in that case recourse may be had to courts of law. It follows that the primary role of Zimbabwean courts is to uphold the Constitution and to protect the rule of law.[4] Courts dispense justice and are expected to do so impartially, without fear or favour.[5]

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[1] ***The Constitution of Zimbabwe Amendment*** (No. 20) Act, 2013

[2] Section 193 of the Constitution of Zimbabwe
See also ***The Judicial Service Commission Strategic Plan 2012 – 2016*** page 1
See also Chidyausiku, G.G. Being ***Speech by The Chief Justice on The Occasion of The Official Opening of The 2014 Legal Year,*** Supreme Court of Zimbabwe, Harare

[3] Chiweshe, F ***The Zimbabwean Legal System, The Judicature*** Journal of the Commonwealth Magistrates and Judges' Association Vol. 10 No. 1 June 1993 pages 7 – 10

[4] Section 3 (b) of the Constitution of Zimbabwe

[5] Section 164 of the Constitution of Zimbabwe
See also ***The Bangalore Principles of Judicial Conduct***, Principle 2.1

Judicial officers resolve disputes between people. They interpret and apply the law, enforce rights and determine civil, criminal and labour disputes. In that process, they do not only define people's rights and responsibilities, but promote the respect of human rights and fundamental freedoms enshrined in the Constitution and;

> "*rights which derive from the inherent dignity of the person."*[6]

The courts provide the necessary checks and balances on other branches of government by ensuring that law of the Legislature and acts of the Executive are in conformity with the rule of law.[7] Courts can, however, only efficiently fulfil these roles if they are competent, independent and impartial.[8] It is not sufficient to have in place good laws when institutions entrusted with their enforcement and application are ineffective. Judicial decisions should be supported by effective enforcement by executive agents such as the police.

The rule of law will only be observed in a climate of a strong, vibrant and independent judiciary. This implies that an independent, strong, respected judiciary is indispensable for the impartial administration of justice in a democratic state. State agents should not ignore judicial decisions. Objectives and functions of the judiciary through its court system have also been aptly captured in the Draft Universal Declaration on the Independence of Justice ("Singhvi Declaration") (Article 1) to include;

a. *"Administering the law impartially, irrespective of parties;*

b. *Promoting, within the proper limits of the judicial function, the observance and attainment of human rights and;*

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[6]Section 164 of the Constitution of Zimbabwe
See also ***Preamble to the International Covenant on Civil and Political Rights***, 1976
[7] Section 3 (b) of the Constitution of Zimbabwe
[8] Section 164 of the Constitution of Zimbabwe

c. Ensuring that all people are able to live securely under the rule of law."[9]

If courts perform their judicial roles efficiently, there will be a decrease in violation of the law and people will be able to enjoy all the rights and liberties constitutionally guaranteed in a democratic dispensation. The need for an independent and impartial judiciary cannot therefore be overemphasized and has been proclaimed in a host of international instruments. The Committee of Experts on Freedom of Association has also aligned itself with these noble sentiments and indicated that it attaches importance to the principle of prompt and fair trial by an independent and impartial judiciary in all cases.[10] The quality of justice in turn depends to a large extent, on the standards observed by judicial officers who are entrusted with dispensing justice in the courts.

All the courts in Zimbabwe are required to act independently in the performance of their judicial functions. They are expected to decide cases before them on the basis of an impartial assessment of the facts and their understanding of the law, free from extraneous influences, inducements, pressures, restrictions, threats or interference, direct or indirect, from any quarter or reason.[11] States have a duty to respect, secure and promote the justice delivery system and the independence of the courts. A judge or magistrate has to execute judicial functions free from any influence by the executive and legislative branches of government in conformity with the principle of "separation of powers."[12] The principle guarantees independence of the judiciary and helps maintain the necessary checks and balances between the three arms of Government. Under the said

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[9] See Article 1 of ***The Universal Declaration on the Independence of Justice ("Singhvi Declaration***).
See also ***The Preamble to the Code of Conduct for Judicial Officers*** – Federal Republic of Nigeria.
See also ***Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO*** (1985 Digest, Para 113)
[10] ***Reports of the Committee of Experts on Freedom of Association*** since 1932 ILO
[11] Section 164 of the Constitution of Zimbabwe
[12] Section 2 (2) of the Constitution of Zimbabwe
See also Section 3 (2) (e) of the Constitution of Zimbabwe

principle, the Executive, the Legislature and the Judiciary are not to interfere in each other's functions but to operate in a balanced fashion.[13] The independence of the judiciary does not only relate to independence from the executive and legislature. It extends to the society in general, the parties who appear before the courts and judicial colleagues. Public confidence will be reinforced in the courts if judicial officers maintain high standards of judicial conduct.

The role of the courts was summarized as follows;

> "*The Primary functions of courts within any society is the resolution of disputes. At the heart of the judicial system lies the premise that self – help by force is unacceptable, so that parties who are unable to solve their dispute amicably may bring it before the court for an impartial resolution. This basic scheme of dispute resolution mechanism promotes good governance and an ordered society, and ultimately, by resolving disputes and redressing violations of rights, the court serve to develop new law and enforce existing law.*
>
> *In addition to the resolution of disputes, courts also help to shape society by pronouncing innovating and creative judgements. Courts also perform an important function of educating and reprimanding the parties before the court, and on occasion, the general public and the social and political institutions. The impact on the court system extends beyond the immediate parties to the cases. The knowledge of the very existence of the judicial system carries over and influences the conduct of members of society, in business as well as personal relationships. This impact of the law has been referred to as the shadow of the law. Judicial decisions are thus able to shape societal ideas and mores, to create laws, as well as to resolve specific disputes.*

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[13] Madhuku, L (2010) ***An Introduction To Zimbabwean Law*** Weaver Press Harare page 44 ***Independence***.
See also ***TheCommonwealth Principles on the Accountability of and the Relationship between the three Branches of Government***.

> *The courts resolve many types of disputes. In civil cases thecourt has to determine the rights and duties of citizens. Civil law governs the relations between private citizens and privateorganisations and defines their legal rights. In contrasts, in constitutional cases the courts have to determine the rights and duties of individual citizens, and the duties, powers and immunities of the government or branches of government, as set forth in the laws and the constitution of the land. Constitutional law defines the state's political organization and powers, imposing substantive and procedural limitations on the state's exercise of its governing power. The resolution of a Constitutional dispute may have a broad impact on society. In criminal matters the courts are asked to pass judgements on disputes when society's organized machinery of sanction is set in action against law violators."*[14]

Courts play a vital role in the application and enforcement of the law. This role for the judiciary is enshrined in the Constitution with a clear structure providing for the jurisdiction of each court.[15]

7.1 Structure of the Courts

In terms of the Constitution;
"Judicial authority derives from the people of Zimbabwe and is vested in the courts which comprise;

(a) The Constitutional Court
(b) The Supreme Court

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[14] Khabo, F.M ***Judicial Independence and Ethics***: Being a presentation by the Deputy President of The Labour Court, Lesotho Vumba Zimbabwe 8th December, 2011.
See also ***The United Nations Basic Principles on the Independence of the Judiciary***, 1985.
See also ***The Latimer House Guidelines for the Commonwealth on Parliamentary Supremacy and Judicial***

[15] Section 162 of the Constitution of Zimbabwe
See also ***Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa***, 2003 (The African Union).

(c) The High Court
(d) The Labour Court
(e) The Administrative Court
(f) The Magistrates' Court
(g) The Customary Law Courts; and
(h) Other courts established by or under an Act of Parliament.[16]

The judiciary of Zimbabwe consists of;

(a) "The Chief Justice, the Deputy Chief Justice and the other Judges of the Constitutional Court;
(b) The Judges of the Supreme Court
(c) The Judge President of the High Court and the other Judges of that court.
(d) The Judge President of the Labour Court and the other Judges of that court.
(e) The Judge President of the Adminstrative Court and the other Judges of that court; and
(f) Persons presiding over magistrate's courts, customary law courts and other courts established by or under an Act of Parliament."[17] Specialized courts such as the small claims court fall under this category.

The Chief Justice is the head of the judiciary and is in charge of the constitutional court and the supreme court.[18]The Judge President of the high court is in charge of that court.[19]The Judge President of the labourcourt is in charge of that court.[20]The Judge President of the administrative court is also in charge of that court.[21]The Chief Magistrate

[16] Section 162 of the Constitution of Zimbabwe
[17] Section 163 of the Constitution of Zimbabwe
[18] Section 163 of the Constitution of Zimbabwe
[19] Section 163 (3) of the Constitution of Zimbabwe
[20] Section 163 (4) of the Constitution of Zimbabwe
[21] Section 163 (5) of the Constitution of Zimbabwe

is in charge of all magistrates in Zimbabwe and is an ***ex-officio*** Commissioner of the Judicial Service Commission.[22] He reports to the Secretary of the Judicial Service Commission who in turn reports to the Chief Justice and the Commission.[23]

An analysis of the new Constitution shows that it has created a stand-alone constitutional court as the highest court in the land on all constitutional matters.[24] The constitutional court vests in the constitutional court original and appellate jurisdiction in all constitutional matters.

The constitutional court, the Supreme Court and the high court have inherent power to protect and regulate their own process and to develop the common law or the customary law, taking into account the interests of justice and the provisions of the Constitution.[25] Whilst the new Constitution of 2013 sets out the courts that make up the judiciary, the specific function or jurisdiction of each court save, for the Constitutional Court, is to be found in Acts of Parliament enacted for this purpose. A comparison between the old Lancaster House drawn Constitution and the new Constitution of 2013 reveals that the new Constitution has restricted the courts.

It is submitted that the change of the structure of the courts has no bearing on the primary obligation of the courts, which remains essentially the same. Whatever the structure, mandate or level of any given court, each court has an obligation to give effective service of all litigants that seek justice from it. A court that fails to do so, defeats the reason for its existence. There is no principle of interpretation that leads one to infer that the legislature ever intended to create an inefficient court.

7.1.1 The Constitutional Court

The Constitutional Court as pointed out above was established as a separate court by the 2013 Constitution. It formally came into existence

[22] Section 189 (f) of the Constitution of Zimbabwe
See also Reynolds, D.A. (1983) ***An Introduction to Law*** Ministry of Justice Harare page 70
[23] Section 163 (2) of the Constitution of Zimbabwe
[24] Section 167 (1) (a) of the Constitution of Zimbabwe
[25] Section 176 of the Constitution of Zimbabwe

on 22 May 2013, the date of the publication of the Constitution. Like its predecessor, the Constitutional Court, has both original and appellate jurisdiction only in constitutional matters.[26] The constitutional court is a superior court of record and consists of the Chief Justice, the Deputy Chief Justice and five other judges of the Constitutional Court.[27]

In cases involving infringement of fundamental human rights and freedom enshrined in Chapter 4 the whole constitutional bench should hear the matter. All the judges have a mandate to hear any matters concerning the election of a President or Vice President.[28] Besides these cases at least three judges can hear other matters.[29] There are, however, instances whereby an Act of parliament specifically provides for interlocutory matters to be heard by one or more judges of the constitutional court. Rules of the court may also provide for the same.[30] There are certain instances whereby the services of an acting judge are required on the constitutional court for a limited period. The Chief Justice is vested with the power to appoint a judge or a former judge to act as a judge of the constitutional court for the specified period.[31] The judge may also continue to sit as judge of the constitutional court for the specified period. The judge may continue to sit as judge of the constitutional court after appointment has expired. This is for the purpose of dealing with any proceedings commenced before him while so acting.[32] As the highest court in all constitutional matters, its decisions bind all other courts.

The decisions form the guiding principles, jurisprudence and precedent binding other superior and inferior courts. The constitutional court is the final court in Zimbabwe which has the final decision on whether a matter is a constitutional matter or whether an issue is connected with a decision on a constitutional matter.[33] Only the constitutional court may advise on the constitutionality of any proposed legislation.[34] It only performs this

[26] Chidyausiku CJ's speech ***op cit*** note 2 page 3
[27] Section 166 (1) (a) – (b) of the Constitution of Zimbabwe
[28] Section 166 (3) (a) of the Constitution of Zimbabwe
[29] Section 166 (3) (b) of the Constitution of Zimbabwe
[30] Section 166 (3) (b) of the Constitution of Zimbabwe
[31] Section 166 (2) of the Constitution of Zimbabwe
[32] Section 166 (4) of the Constitution of Zimbabwe
[33] Section 167 (1) of the Constitution of Zimbabwe
[34] Section 167 (2) (a) of the Constitution of Zimbabwe

function where the concerned legislation has been referred to it in terms of the Constitution. It therefore plays an advisory role. The constitutional court as an independent arm of the government and in line with the doctrine of "separation of powers" has the mandate to determine whether Parliament or the President has failed to fulfil a constitutional obligation.[35]

Rules are normally required to regulate the smooth operation of any court. An Act of Parliament may provide for the exercise of jurisdiction by the constitutional court and for that purpose may confer the power to make rules of court.[36]

It is mandatory for the Rules of the constitutional court to make provision which allow a person, when it is in the best interest of justice and with or without leave of the constitutional court;

(a) To bring a constitutional matter directly to the constitutional court.[37]
(b) To appeal directly to the court from any other court.[38]
(c) To appear as a friend of the court.[39]

7.1.2 The Supreme Court

This is governed by the Supreme Court Act.[40] In terms of the Constitution of 2013 the Supreme Court has been re-established as the final court of appeal in all non-constitutional matters.[41] It is essentially a court of appeal with no original jurisdiction. The Supreme Court is a superior court of record and consists of the Chief Justice, the Deputy Chief Justice, no fewer than two other judges of the Supreme Court and any additional judges appointed in terms of the Constitution.[42] The Supreme Court hears

[35] Section 167 (2) (d) and 167 (3) of the Constitution of Zimbabwe
[36] Section 167 Section 167 (4) of the Constitution of Zimbabwe
[37] Section 167 (5) (a) of the Constitutionof Zimbabwe
[38] Section 167 (5) (b) of the Constitutionof Zimbabwe
[39] Section 167 (5) (c) of the Constitutionof Zimbabwe
[40] See generally the ***Supreme Court Act*** [Chapter 7:13]
[41] Section 169 (1) of the Constitutionof Zimbabwe
[42] Section 168 (a) – (c) of the Constitutionof Zimbabwe

all appeals from the High Court.[43] It also hears appeals on points of law only from the Administrative and Labourcourts.[44] It also hears appeals from other tribunals and courts such as the court martial set up under the Defence Act and the Law Society Tribunal set up under the Legal Practitioners Act, Electoral Court and Fiscal Appeal Court [45]

Its membership has been increased from five to nine judges of appeal. The Chief Justice has the constitutional mandate to appoint an additional judge if the services are required.[46] A judge of the high court or former judge of the Supreme Courtmay be appointed in an acting capacity for a specific period.[47] Such a judge appointed to act may continue to sit as judge of the Supreme Court after the appointment has expired. This is for the purpose of dealing with any proceedings commenced before while in such acting capacity.[48]

An Act of Parliament may confer additional jurisdiction and powers on the Supreme Court.[49] This is subject to Section 169 (1) of the Constitution.[50] An Act of Parliament may also provide for the exercise of jurisdiction by the Supreme Court and for that purpose may confer the powers to make rules of court.[51] The Rules of court may confer on a registrar of the Supreme Court any of the court's jurisdiction and powers in civil cases.

(a) "To make orders in uncontested cases, other than orders affecting status or the custody or guardianship of children;[52]

(b) To decide preliminary or interlocutory matters, including application for directions, but not matters affecting the liberty of any person."[53]

[43] Section 169 of the Constitutionof Zimbabwe
[44] Section 169 of the Constitutionof Zimbabwe
[45] Section 169 of the Constitutionof Zimbabwe
[46] Section 168 (a) – (c) of the Constitutionof Zimbabwe
[47] Section 168 (2) of the Constitutionof Zimbabwe
[48] Section 168 (3) of the Constitutionof Zimbabwe
[49] Section 169 (2) of the Constitutionof Zimbabwe
[50] Section 169 (1) of the Constitutionof Zimbabwe
[51] section 169 (3) of the Constitutionof Zimbabwe
[52] section 169 (4) (a) of the Constitutionof Zimbabwe
[53] section 169 (3) of the Constitutionof Zimbabwe

The Rules must however give any person affected by the registrar's order or decision a right to have it reviewed by a judge of the Supreme Court. The judge of the Supreme Court may confirm, amend or set aside the registrar's order. The Supreme Court judge has also powers to give any other order or decision he or she thinks fit.[54]

7.1.3 The High Court

The High Court of Zimbabwe is a Superior Court of record.[55] It consists of the Chief Justice, the Deputy Chief Justice, the Judge President of the High Court and such other judges of the High Court as may be appointed from time to time.[56]

It is governed by the High Court Act.[57] It has original jurisdiction over all civil and criminal matters in Zimbabwe.[58]It also has jurisdiction to supervise Magistrates' Court and other subordinate courts and to review their decisions.[59] It may decide constitutional matters except those that only the Constitutional Court may decide.[60] In addition the High Court has such appellate jurisdiction as may be conferred on it by an Act of Parliament.[61] Such Act of Parliament may confer the power to make the rules of the court.[62]

In criminal trials, the High Court is duly constituted if it consists of one judge and two assessors. Assessors assist in deciding issues of fact and have an equal say as the judge in that regard. They may even outvote the Judge if they so decide.[63] When the high court is hearing appeals, at least two judges are required. Where an even number of judges sit on appeal and the opinion is equally divided, the decision is suspended until the opinion of a third judge has been obtained. Assessors are not required during appeal hearings.

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[54] Section 169 (4) (a) – (b) of the Constitutionof Zimbabwe
[55] Section 170 (a) – (b) of the Constitutionof Zimbabwe
[56] Section 170 (a) – (b) of the Constitutionof Zimbabwe
[57] See the High Court of Zimbabwe [Chapter 7:06]
[58] Section 170 (a) – (b)Section 171 (1) (a) of the Constitutionof Zimbabwe
[59] Section 170 (a) – (b)Section 171 (1) (b) of the Constitutionof Zimbabwe
[60] Section 170 (a) – (b)Section 171 (1) (c) of the Constitutionof Zimbabwe
[61] Section 170 (a) – (b)Section 171 (1) (d) of the Constitutionof Zimbabwe
[62] Section 170 (a) – (b)Section 171 (2) of the Constitutionof Zimbabwe
[63] ***S v Tekere And Others*** 1980 ZLR HH 489 at 490

The High Court has jurisdiction over all persons and over all criminal offences recognized by the law except that the President may not be tried for any criminal offences during his term of office. The High Court has unlimited criminal jurisdiction. It may pass any sentence permitted by the law, including the death penalty.

Its powers of punishment are unrestricted in regard to the amount of the fine or the term of imprisonment that may be imposed except in relation to certain statutes, which prescribe maximum penalties. The High Court has power to review and alter the decisions of the lower courts. When it reviews the work of the magistrates it is enjoined to satisfy itself that the proceedings are in accordance with real and substantial justice.

If not the High Court has the power to withhold its certificate and quash the proceedings and give directions to the lower court as it deems fit. The High Court can also alter the decisions of the lower courts.[64] In addition it has appellate jurisdiction regarding appeals against both sentence and conviction from the Magistrates' Court.

In civil cases, the judge sits alone. A judge, however, has discretion to appoint an assessor or assessors to assist him in a civil case. In this regard the assessors act only in an advisory capacity and are not entitled to vote in the decision of the court.[65] Assessors are appointed from persons who have either experience in the administration of justice or experience or skill in any matter, which may have to be considered, by the court. An assessor may also be appointed on the basis that has any other experience which in the opinion of the Chief Justice or Judge President renders him suitable to act as assessor. Either party to the trial is entitled to challenge the appointment of a particular assessor.

The High Court has full original jurisdiction over all persons and over all civil matters within Zimbabwe.[66] Its original jurisdiction is unlimited. It may deal with any nature of claim and there are no monetary limits to claims that may be instituted. It is the only court, which enjoys inherent jurisdiction, meaning that unless prohibited by some law from exercising jurisdiction, it is deemed to have jurisdiction. The High Court

[64] ***S v Pillay*** 1995 (2) ZLR 313 (H) at 315
[65] Section 5 (2) of the High Court Act [Chapter 7:06]
[66] Section 13 of the High Court Act [Chapter 7:06]

also has appellate jurisdiction in civil cases. Appeals only lie in the High Court where there is specific provision in a statute granting a right of appeal to the High Court. It is a court of appeal for decisions in the Magistrates' Courts and also has inherent review powers over proceedings of all inferior courts tribunals andadministrative authorities.

An act of Parliament may provide for the High Court to be divided into specialized divisions. Such divisions however must be able to exercise the general jurisdiction of the high court in any matter that is brought before it.[67] Rules of court may confer on a registrar of the High Court power in civil cases.

(a) To make orders in uncontested cases, other than orders affecting status or the custody or guardianship of children;[68]

(b) To decide preliminary or interlocutory matters, including applications for directions, but not matters affecting the liberty of any person.[69]

It is mandatory that the rules must give any person affected by the registrar's order or decision a right to have it reviewed by a Judge of the High Court. The judge of the High Court may confirm, amend or set aside the order or give any other order or decision he or she thinks fit.

In terms of extra territorial jurisdiction the courts of Zimbabwe are not confined to the borders of the country. This principle was considered in a number of cases. In ***S v Mharapara***[70] it was held that there is no justification for rigid adherence to the argument that extra territorial jurisdiction should be confined to treason. The principle is decreasingly applicable to the facts of international life. Crimes may occur in more than one state. The courts should consider the place of impact or intended impact. In ***S v Mharapara***[71] a Zimbabwean diplomat had stolen money belonging to the Zimbabwean government while in a foreign country.

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[67] Section 171 (3) of the Constitution of Zimbabwe

[68] Section 171 (4) (a) of the Constitutionof Zimbabwe

[69] Section 171 (4) (b) of the Constitutionof Zimbabwe

[70] ***S v Mharapara*** 1985 (2) ZLR 211 (S)
See also Madhuku, L (2010) ***An Introduction To Zimbabwean Law*** Weaver Press Harare pages 66 - 67[71]Ibid

In ***S v Kapurira***[72] it was held that the people and results were broadly Zimbabwean and the case could be heard here. McNally JA (as he then was) in his judgement referred to the principles of comity and effectiveness.

The appellant and another person, who were both Zimbabwean citizens, had crossed into Mozambique in order to attend to a beer drink there. Appellant had allegedly attacked his fellow Zimbabwean and fatally wounded him. The victim had been taken to Zimbabwe where he died of bleeding from the wound. When appellant returned to Zimbabwe he was arrested and charged with murder. The High Court decided that it had jurisdiction to try this case and the appellant appealed against this decision. It was held that the courts would not readily surrender their jurisdiction especially where the principles of comity and effectiveness were satisfied. The comity principle would be satisfied where there was no danger of offending another state by exercising jurisdiction in the matter. The effectiveness principle would be satisfied where the court is able to reach the people involved and so give effect to its judgment. It was held further that the High Court had properly assumed jurisdiction in the case.

In ***S v Zendere***[73] the accused altered a passport to effect a forgery in the no – man's land between Zimbabwe and Botswana, for the purpose of entering Botswana. He was convicted in the Zimbabwean magistrates' court but on review the issue of jurisdiction arose, since the prejudice would apparently be to the Botswana government.

It was held by Ndou J (as he then was) that where a substantial element of a crime or its harmful effect occurred in Zimbabwe, and there is no conflict with the right of another state, there is no breach of international law when a Zimbabwean court assumes jurisdiction over an offence committed by its national outside its territory. Since the accused was a Zimbabwean national, the forgery occurred in an area patrolled by the

[72] ***S v Kapurira*** 1992 (2) ZLR 17
[73] ***SvZendere*** H-B 19/04
See also ***R v Baxter*** [1971] 2 ALL ER 359 (CA)
See also ***S v Kanyamula***1983 (2) ZLR 222(5)
See also ***R v Vickers*** [1975] 2 ALLER 945 (SA)
See also ***Treacy v DPP*** [1971] ALLER 110 (HL)

Zimbabwe Republic Police, the passport was the property of the Zimbabwe government and there was no danger of interfering with another country's jurisdiction. The jurisdiction of a Zimbabwe magistrates' court was confirmed. It was further held that the Immigration Act S36 (1) (a) provides for extra – territorial criminal jurisdiction for forgery of passports. The same applies today with fraud of passports.[74]

7.1.4 The Labour Court

This is governed by the LabourAct. The LabourCourt is a specialized court of record and consists of a Judge President and such other judges of the labour court as may be appointed from time to time.[75] Unlike the Constitutional Court, Supreme Court and High Court the Chief Justice and the Deputy Chief Justice are not part of the Labour Court.

The Labour Court's main function is to deal with matters of labour and employment. Its jurisdiction is conferred by an Act of parliament. An Act of Parliament may provide for the exercise of jurisdiction by the labourcourt and for that purpose may confer the powers to make rules of the court.[76]

7.1.5 The Magistrates' Court

The new Constitution of 2013 provides for an Act of parliament which may provide for the establishment, composition and jurisdiction of Magistrates' Courts, to adjudicate on civil and criminal cases.[77] The Magistrates' Court is created by the Magistrates' Court Act which provides for the powers and duties of the court.[78] The Court is a creature of statute

[74] Section 36 (1) (a) of the***Immigration Act*** [chapter 4:02]
See also ***DPP v Stonehouse*** [1977] 2 ALL ER 909 (HL)
See also ***S v A*** 1979 RLR 69 (GD)
[75] ***Labour Act*** [Chapter 28:01] See also Section 171 (a) – (b) of the Constitutionof Zimbabwe
[76] Sections 172 (2) – (3) of the Constitutionof Zimbabwe
[77] Section 174 (a) of the Constitutionof Zimbabwe
[78] See the ***Magistrates' Court Act*** [Chapter 7:10]

and can only derive its powers within the confines and parameters of the four corners of the statute. It is an inferior court of record and its decisions do not form any binding precedent. The Magistrates' Court Act provides that there shall be one or more Magistrates' Court for each province.

It also provides by order in the gazette the creation of regional divisions consisting of one or more provinces.[79] The Magistrates' Courts deal with customary and general law.[80] It also has jurisdiction relating to appeals and reviews of decisions of customary law courts below it in rank and structure. These are proceedings of local courts.

The Magistrates' Court is presided over by a magistrate appointed bythe Judicial Service Commission. In terms of the exercise of criminal jurisdiction there are four grades or classes of magistrates. These are magistrate, senior magistrate, provincial magistrate and regional magistrate.[81] There is no specified minimum qualification for a person to be appointed as a magistrate. Any fit and proper person may be appointed as a magistrate. In practice, only persons who have undergone legal training by the Judicial College of Zimbabwe or other recognized universities are appointed as magistrates. Appointment from magistrate to senior magistrate and provincial magistrate is through advancement. The number of years served and disciplinary issues play a key role in such advancement. The only promotional grades are those of the regional magistrate, Deputy Chief Magistrate and the Chief Magistrate.[82] People have to compete for the advertised post. Professional qualifications, experience, competence and discipline play a key role in the selection process. The posts of Chief Magistrate and Deputy Chief Magistrate are more administrative though there is no any law which prohibits them to preside over criminal or civil cases in the magistrates' courts.

A Magistrates' Court is fully constituted when a magistrate sits alone. A magistrate may also sit with one or two assessors in a criminal trial. This is however very rare in Zimbabwe. The circumstances of

[79] Reynolds ***Op cit*** note 22 page 69
[80] Section 8 of the Magistrate Court Act
[81] Section 7 of the Magistrate Court Act
[82] Sections (9) and (10) of the ***Judicial Service Regulations*** S.I 30 of 2015 [Chapter 7:18]
Section 182 of the Constitutionof Zimbabwe
Section 6 of the Magistrate Court Act

appointment of assessors depend on whether the magistrate concerned is a regional magistrate or not. Regional magistrates have the discretion whether or not to have an assessor (s) subject to the discretion of the Chief Magistrate.

They must however, choose assessors from persons who are qualified to act as assessors in the high court in terms of the High Court Act.[83]

Any other magistrate who may require assessors requires the approval of the Judicial Service Commission. Such assessors need not be qualified to act as high court assessors but must simply be persons who have;

> *"experience in the administration of justice or skill in any matter, which may have to be considered at the trial."*[84]

Assessors assist the magistrate in making findings of fact only. In determining matters of fact, where there are two assessors, each has an equal say with the magistrate and the findings of the court will be the decision of the majority. Where, however, there is only one assessor, the finding of fact made by the magistrate prevails, in an event of a difference in opinion.[85] The magistrate alone determines any issues relating to matters of law.[86] The determination of an appropriate sentence is also the sole responsibility of the magistrate although he may consult the assessor if he deems it fit.

The geographical territory where the crime occurred, the nature of the crime and the punishment that may be imposed determine criminal jurisdiction.[87] Magistrates' Courts generally have jurisdiction to try a crime committed wholly inside Zimbabwe. They also have jurisdiction to try a crime committed partly outside Zimbabwe if the conduct that completed the crime took place inside Zimbabwe. Further, they have jurisdiction where the crime was committed wholly or partly outside Zimbabwe if the crime;

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[83] Section 16 of the Magistrate Court Act
[84] Section 52 of the Magistrate Court Act
[85] Sections 16 and 52 of the Magistrate Court Act
[86] Ibid
[87] Section 8 of the Magistrate Court Act

(a) "Is a crime against public security in Zimbabwe or against the safety of the state of Zimbabwe.[88]

(b) Is a crime that produced or was intended to produce a harmful effect in Zimbabwe or was committed with the realization that there was real risk that it might produce a harmful effect in Zimbabwe.[89] *In addition, magistrates' courts have extra-territorial jurisdiction over certain statutory crimes where the statute in question has extra-territorial effect."*[90]

With reference to crimes committed in Zimbabwe, the general rule, is that a crime may only be tried in the Province or Region in which it occurred. This is, however, subject to some exceptions, that is, where the offence is committed in several jurisdictions. It may be tried in any one of them. The Prosecutor-General may also direct that the offence be tried in any province. This is with the consent of the accused.[91]

As regards the nature of the crime, magistrates have jurisdiction over all offences except treason, murder committed in aggravating circumstances and statutory offences for which a mandatory death sentence is provided for.[92] As regards sentencing, the jurisdiction of a magistrate depends on his grade or level. This is whether he or she is a magistrate, senior magistrate, provincial magistrate or regional magistrate. In certain statutory offences all levels of magistrates enjoy increased sentencing jurisdiction. This depends with provisions of the different statutes.[93]

All magistrates have the same civil jurisdiction regardless of their seniority. Magistrates'Courts also have the jurisdiction to apply both

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[88] ***S v Mharapara*** (*supra)*
[89] ***S v Kapurira*** *(supra)*
[90] Section 15 of ***The Public Order And Security Act*** [Chapter 11:17]
[91] 78 Section 56 (9) of the Magistrate Court Act
[92] Section 49 (1) of the Magistrate Court Act
See also Section 48 of the Constitution of Zimbabwe in respect of categories of people who can be sentenced to death
[93] Section 79 of the ***Criminal Law (Codification and Reform) Act*** [Chapter 9:23]

customary and general law in their determination of civil disputes. Generally magistrates' only have jurisdiction in a civil case if:

(a) The amount claimed does not exceed its prescribed monetary limit of jurisdiction which amount is prescribed from time to time.[94]
(b) Either the defendant resides, carries on business or is employed within the province where the court is situated or the cause of action arose wholly within the province.[95]

Parties may, however agree by a memorandum signed by them or their respective legal practitioners that a particular Magistrates' Court shall have jurisdiction. Such agreement will be binding on the court concerned and it shall be obliged to exercise jurisdiction.

Magistrates' courts are prohibited from exercising civil jurisdiction in certain specified instances. These include;

i. Disputes in respect of the validity or interpretation of a written will.[96]
ii. The status of a person in respect of mental capacity.[97]
iii. Dissolution of a marriage other than a marriage solemnized in terms of the Customary Marriage Act.[98]
iv. The specific performance of an act without an alternative of payment of damages.[99]
v. Decree of perpetual silence.[100]
vi. Provisional sentence.[101]

For the purpose of expedience there are specialized courts which have been created under all levels of the Magistracy.[102] There are Victim

[94] Section 11 (1) (vii) of the Magistrate Court Act
[95] Section 11 (1) (IV) of the Magistrate Court Act
[96] Section 14 (1) (b) of the Magistrates' Court Act
[97] Section 14 (1) (c) of the Magistrates' Court Act
[98] Section 14 (1) (a) (i) of the Magistrates' Court Act
[99] Section 14 (1) (d) of the Magistrates' Court Act
[100] Section 14 (1) (e) of the Magistrates' Court Act
[101] Section 14 (1) (f) of the Magistrates' Court Act
[102] Madhuku ***op cit*** note 13 page 61

Friendly Courts which are at every Regional Court in the Country. There are also Small Claims Courts at Provincial level to deal with minor monetary claims. The Maintenance Court specifically deals with maintenance issues. Magistrates' Court are fully operational throughout the year. There are no terms in the legal year as with superior courts. Magistrates' Courts open every Monday to Saturday. They may even open on certain days during public holidays in line with Constitutional provisions.[103] This is in respect of criminal matters whereby detained persons in police custody have to be brought before the court within forty eight hours of their arrest.[104]

7.1.6 The Administrative Court

This is governed by the Administrative Court Act.[105] Like the Labour Court the Administrative Court is a specialized court of record. It consists of a Judge President and such other judges of the Administrative Court as may be appointed from time to time.[106] As with the Labour Court it does not consists of the Chief Justice and the Deputy Chief Justice. This is unlike the Constitutional Court, Supreme Court and High Court. The Chief Justice however remains as the head of the judiciary.

The Administrative Court has such jurisdiction over administrative matters as may be conferred upon it by an Act of parliament. An Act of parliament may also provide for the exercise of jurisdiction by the Administrative Court and for that purpose may confer the powers to make the rules of the court.[107]

7.1.7 Other Courts

An Act of Parliament may provide for the establishment, composition and jurisdiction of customary law courts whose jurisdiction consists

[103] Section 50 (2) of the Magistrates' Court Act
[104] Section 50 (3) of the Magistrates' Court Act
[105] See the ***Administrative Court Act*** [Chapter 7:05]
[106] Section 173 (a) – (b) of the Constitution of Zimbabwe

primarily in the application of customary law.[108] It can also provide for other courts subordinate to the High Court as provided for by the Constitution.[109] The Constitution also provides for the enactment of an Act of parliament providing for the establishment, composition and jurisdiction of tribunals for arbitration, mediation and other forms of alternative dispute resolution.[110]

[107] Sections 173 (2) and 173 (3) of the Constitution of Zimbabwe
[108] Section 174 (b) of the Constitution of Zimbabwe
[109] Section 174 (c) of the Constitutionof Zimbabwe
[110] Section 174 (d) of the Constitution of Zimbabwe

CHAPTER 8

Fundamentals of Criminal Procedure and its Nature

8.0 Introduction:

The law can be classified into 'substantive law' and 'adjectival law[1]'. Substantive law defines rights, duties and liabilities and includes such branches of law like Criminal law, law of Delict, law of Contract etc.[2]. Adjective law defines procedure, pleading and proof and includes such branches of law like criminal procedure, civil procedure and the law of evidence. Criminal and civil procedures can further be streamlined as falling under what is known as 'Procedural Law'. Procedural law is that part of the law which lays down rules for how cases must be prepared and presented in court, and how the court must handle them.[3]

8.1 Criminal procedure and its nature

It must not be overlooked that criminal law and criminal procedure are two distinct parts of the law. Criminal law describes what kind of behaviours is classified as a crime and how a criminal court should sentence a wrongdoer.[4] Criminal procedure spells out the rules, which govern and regulate the due and proper conduct of a criminal case from its inception to finalisation.[5] The rules of criminal procedure provide,

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[1] Madhuku, L (2010) ***An Introduction To Zimbabwean Law***, Weaver Press Harare page 40.
See also Arnold T.W. ***The Role of Substantive Law and Procedure In Legal Process*** Harvard Law Review (1932), Vol. XLV No. 4
See also Definition of Adjectival Law by Merriam Webster Dictionary page 5
[2] Madhuku ***op cit*** note 1 page 40
[3] Madhuku ***op cit*** note 1 page 36.
[4] Ibid
[5] Madhuku ***op cit*** note 1 page 40

amongst other things, how and when the police can arrest a suspect, how such suspect is to be dealt with after arrest and how the courts must conduct criminal trials.

In Zimbabwe the rules of criminal procedure are mainly provided for by the Criminal Procedure and Evidence Act which in practice Legal Practitioners and Prosecutors refer to simply in short as the CP & E Act.[6] The following are key components of the nature of Criminal proceedings from inception to finalisation of a criminal case.

8.1.1 Arrests

The most common method of commencing criminal proceedings is by way of arrest.[7] Two types of arrests are provided for in our criminal procedure law namely:-

- Arrests without warrants
- Arrests with warrants

1. Arrest Without Warrant

A person's liberty is guaranteed by the Constitution, which provides that –

Every person has the right to personal liberty, which include:- the right

(a) *"Not to be detained without trial; and*
(b) *Not to be deprived of their liberty arbitrary or without just cause*".[8]

[6] Madhuku ***op cit*** note 1 page 116
[7] Part (V) A, B and C of the Criminal Procedure and Evidence Act [Chapter 9:07] See also, Feltoe G (2008) ***Magistrates' Handbook*** Legal Resources Foundation Harare pages 8-12.
[8] Section 49(1)(a)-(b) of the Constitution of Zimbabwe.

The right to personal liberty may only be derogated from in circumstances provided for, by the Constitution. In our law it is this provision which forms the basis for an arrest. The Constitution makes it peremptory that every person has a right to personal liberty which includes the right not to be detained without a trial and not to be deprived of their liberty, arbitrarily or without just cause.[9]

Who can lawfully arrest without warrant?

The Criminal Procedure and Evidence Act provides that a peace officer (police officer), judge, magistrate or justice of peace and a private person may arrest without warrant.[10] In practice, it is normally the peace officer in the form of a police officer who effect arrests.

For this reason and because it is the duty of the police to see to it that crimes are either prevented or detected and that those engaging in criminal activities are dealt with in accordance with the law, the code has provided detailed provisions governing this category of persons.[11]

8.1.2 Police Officers

The Police have the power to arrest suspects and to hold them in custody.[12] Thispower is however, not an unlimited power. If the police do not act within the scope of their legal powers then their actions are unlawful and those affected by such actions can bring civil claims for unlawful arrest and imprisonment against the arresting authorities.[13]

[9] Ibid
[10] Section 24(1)-(2) of the Criminal Procedure and Evidence Act
[11] Section 24-25 of the Criminal Procedure and Evidence Act
[12] Ibid
[13] Ibid

8.1.3 Arrest by a Police Officer arrest without warrant

The Criminal Procedure and Evidence Act provides that a police officer is authorised to exercise his right of arrest without warrant on –

a) any person who commits any offence in his presence;[14]
b) any person whom he has reasonable grounds to suspect of having committed any of the offences mentioned in the First Schedule or the Ninth Schedule. In respect to a ninth schedule offences the arresting officer must be of or above the rank of Assistant Inspector or one who has been given leave to effect an arrest by an officer of the said rank.[15]
c) any person whom he finds attempting to commit an offence or clearly manifesting an intention so to do.
   No difficulties arise where the police catch the culprit red-handed. The culprit may immediately, be arrested by virtue of Section 25 (1) (a) & (c) of the Criminal Procedure and Evidence Act. The difficulties may arise where the police do not apprehend the person when he is in the process or act of actually committing a crime.

By virtue of the provisions of Section 25 (1) (b), a police officer can arrest without warrant any person whom he has 'reasonable grounds to suspect' of having committed any offence mentioned in the First Schedule or Ninth Schedule.[16]

8.1.4 The requirements to make an arrest lawful

The law provides that all arrests without warrant are, *prima facie*, illegal and the onus rests on the arresting authority to justify the arrest by establishing, on a balance of probabilities, that the arrest was lawfully

[14] Section 25(1) (a) of the Criminal Procedure and Evidence Act
[15] Section 25 (1) (b) of the Criminal Procedure and Evidence Act
See also ***Muzonda v Minister of Home Affairs and Another*** S-17-93.
[16] Section 25(1)(c) of the Criminal Procedure and Evidence Act

justified.[17] The arrest can only be lawful if the arresting officer had reasonable grounds to suspect that the accused had committed a First Schedule offence.[18] Thus it must be proved, on a balance of probabilities, that the officer did genuinely have this suspicion and that his suspicion was based on reasonable grounds.[19]

8.1.5 A reasonable suspicion

The question is when does an officer have reasonable grounds for his suspicion? This belief or suspicion must satisfy an objective test of reasonableness. A reasonable police officer would avoid jumping to an unreasonable conclusion and would not arrest a person where there are no reasonable grounds for doing so.[20] Thus a suspicion will not be based on reasonable grounds –

- Where the arresting officer acts without any information or evidence whatsoever, e.g. where the arrest is based on a pure hunch or a bare, unsubstantiated suspicion; or
- Where the arresting officer acts on the basis of information that is vague, flimsy and unsubstantiated or where, in the circumstances the suspicion is tenuous or is a wild assumption.

It must be noted here, that in deciding whether a reasonable suspicion has been proved, it must of necessity be recognized that a reasonable suspicion never involves certainty as to the truth. Where it involves certainty, it ceases to be suspicion and becomes fact. Suspicion by its very nature is a state of conjecture or surmise whereof proof is lacking[21] 'I suspect but I cannot prove!'

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[17] Section 25 (1) (a), (b) and (c) of the Criminal Procedure and Evidence Act
[18] Section 25 (b) of the Criminal Procedure and Evidence Act
[19] Ibid
[20] Ibid
See also ***Attorney – General v Blumears and Another*** 1991 (1) ZLR 118 (S).
See also ***Lupepe v AG and Another*** HB-130-93.
See also ***Smyth v Ushewekunze and Another*** 1997 (2) ZLR 544 (S).
[21] Section 25 (b) of the Criminal Procedure and Evidence Act

8.1.6 Arrest with warrant

The Criminal Procedure Evidence Act provides for arrests occasioned with a warrant.[22] In terms of the provision – an application by the Prosecutor General, a Public Prosecutor or a Police Officer (who is either of, or above, the rank of an inspector or is an officer in charge of a station who is of, or above, the rank of assistant inspector), any judge, magistrate or justice may issue a warrant for the arrest of any person.[23]

A warrant of arrest is a court order, in writing, commanding that the person named therein be arrested by a peace officer, in connection with the crime specified and that upon arrest such mentioned person be dealt with in accordance with the provisions of the law.[24] In this regard the accused must as soon as possible be brought to a police station or charge office, or any other place specifically mentioned in the warrant and shall thereafter be taken to court as soon as possible upon a named charge.[25]

8.1.7 Procedure after arrest without warrant

It is a requirement that the person arrested without warrant must as soon as possible be transmitted to a police station or charge office. The police are entitled to detain him for not more than forty eight hours, whereupon they are obliged to either produce the person before a court upon a charge of any offence or release such person. Upon being produced in court, within the statutorily stipulated period, the State is required to apply for a court order to place the accused on remand.

The court has the discretion to either grant or dismiss the application.[26]

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[22] Section 33 of the Criminal Procedure and Evidence Act

[23] Section 33 (b)-(d) of the Criminal Procedure and Evidence Act

[24] Section 34 (3) of the Criminal Procedure and Evidence Act

[25] Ibid

[26] Section 32 of the Criminal Procedure and Evidence Act

See also in respect of detention of a period in excess of 48 hours in Police Custody without warrant for further Detention – the case of ***Nyambuya and Other v OC ZRP Manicaland Province and Others*** HH 37-06.

8.2 Remand application

Remands are specifically provided for by the Criminal Procedure and Evidence Act. Because of the forty eight hour limit, suspects are normally brought to court by the police before the completion of investigations and therefore at a stage when the prosecuting authority is not in a position to try the case. In the circumstances the suspect is brought to court for an initial remand. An initial remand is the court hearing where the prosecution makes the initial court application to have the arrested person placed on remand pending, ***inter alia***, the completion of police investigations and arraignment for trial.[27]

The application will be granted in circumstances where the court is satisfied that the facts relied upon by the State, as supporting the allegations against the accused, establish a reasonable suspicion that the accused committed or was about to commit the alleged offence. Where the accused faces either a First Schedule offence or a Third Schedule offence, other than one listed in paragraph 10 thereof, he has the right to immediately apply to be released on bail.[28]

8.3 Bail

Bail is the procedure, under which, an accused who appears in court in the custody of officers of the law, and facing a criminal charge, is released by an order of court, subject to his or her undertaking or coupled with another's (surety) undertaking that the accused will appear at the place and time specified by the court. The undertaking is called a recognizance. The Act makes it a pre-condition for admission to bail that an accused submits a recognizance.[29]

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[27] Feltoe ***op cit*** note 7 page 15.
[28] Feltoe ***op cit*** note 7 page 16.
[29] Feltoe ***op cit*** note 7 page 24.
See also ***S v Biti***, 2002 (1) ZLR 115 (H)
See also ***S v Ndlovu*** 2001 (2) ZLR 261 (H).
See also ***Ncube v S***, 2001 (2) ZLR 556(S).

8.3.1 Application for bail

The Act permits the accused to apply, at anytime, weather verbally or in writing to the judge or magistrate, before whom he is appearing, to be admitted to bail immediately.[30] The court will only grant bail when satisfied that the accused, if released from custody, will do nothing to prejudice the interests of justice.

This of necessity means that the court will need to weigh the reasons for and against granting bail and try to strike a balance as far as possible between protecting the individuals liberty and safe-guarding and ensuring the proper administration of justice.[31]

More specifically the main considerations normally requiring the courts determination in a bail application are whether an accused will appear to stand trial or will carry out any act, which may prejudice the ends of justice, such as, tampering with police investigations or witnesses.[32]

8.3.2 Granting of bail

The Act gives a court the discretion and the power to admit an accused to bail. When granting bail the magistrate should always invoke the provisions of Section 118 of the Criminal Procedure and Evidence Actwhich require that a recognizance be taken from the accused or from accused and one or more sureties.[33]

In addition to demanding a recognizance the court in the exercise of its discretion is at liberty to attach other suitable conditions to the bail order. This is done with the aim of ensuring that the interests of justice

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[31] ***S v Malimawa*** HB - 34-03.
[30] Section 117(1) of the Criminal Procedure and Evidence Act
See also ***S v Gwatiringa*** HH – 128-88.
See also ***S v Chiadzwa*** 1988(2) ZLR 19(S)
See also ***Aitken and Another v AG*** 1992 (1) ZLR 249 (S).
See also ***S v Hussey*** 1991 (2) ZLR 187 (S).
See also ***SvJongwe*** 2002 (2) ZLR 209(S).
See also ***S v Mambo*** 1992 (1) ZLR 245 (H).
[32] Ibid
[33] Section 116-117 of the Criminal Procedure and Evidence Act

are not prejudiced when the accused is out on bail. Courts impose conditions such as –

- The surrender to the court of travel documents
- Prohibition from visiting or entering specified places
- Prohibition from interfering or communicating with named persons
- Order to report at a named police station on specified days and times may also be attached to the bail order.[34]

8.4 Criminal Trials

8.4.1 Accusatorial System

In the prosecution of crime our criminal justice system adopts an **accusatorial** procedure.[35] The parties involved are the prosecutor, the accused (and or his defence lawyer) and the judge or magistrate. The judge or magistrate is "*... the detached umpire who should not enter the arena of the fight between the prosecutor and the defendant (accused) for fear of becoming partial or losing perspective as a result of all the dust caused by the fray"*.[36] In this system, the police handle the investigations, gather the evidence and pass it on, in the form of a dossier ("docket") to the public prosecutor who becomes ***dominuslitis*** (master of the proceedings) and decides on appropriate charges and venue of trial.[37] It is ultimately the responsibility of the prosecutor to ensure that

[34] ***S v Fourie*** 1973 (1) SA 100 (D).
See also ***S v Micklethewait*** 2003(1) ZLR 26(H).
See also ***S v Prior*** 2002 (2) ZLR 349 (H).
See also in Contrast ***S v Tsvangirai and Others*** 2003 (1) ZLR 618 (H).
[35] Redgment, J (1981) ***Introduction to the Legal System of Zimbabwe*** Belmont Bulawayo pages 71-72.
See also Hiemstra J ***Ablolition of the Right not to be Questioned: a Practical Suggestion for Reform in Criminal Procedure*** (1963) 80 SALJ 187.
[36] Bekker P.M et al (2005) ***Criminal Procedure Handbook*** Seventh Edition, Juta page 18.
[37] Ibid

the docket is ready for trial. It is also his ultimate responsibility of ensuring the proper drafting of a charge and state outline.

When the matter is brought to court the trial proceeds in the form of a contest between the prosecution and the accused. Each party do the questioning by leading evidence from his own witnesses and cross-examining the opponent's witnesses. An accused may be represented by a legal practitioner who may assist him to present his defence and cross examine state witnesses.[38]

8.4.2 Inquisitorial System

The accusatorial system differs from the inquisitorial procedure adopted by some countries where the judge or magistrate is ***dominuslitis,*** in that he or she actively conducts the proceedings by dominating the questioning of the accused and witnesses after the arrest of the accused.[39] He or she effectively conducts the investigations. During trial, the judge or magistrate also primarily does the questioning of witnesses and not the prosecutor, accused or defence lawyers.[40] The essential difference between the accusatorial and inquisitorial procedures essentially lies in the functions of the parties, that is, the judicial officer, the prosecution and the defence.[41]

8.4.3 The Parties

In the magistrate's court the main parties are the magistrate, the prosecutor and the accused (or his defence lawyer). The magistrate, the public prosecutor and the accused's lawyer by virtue of being officers of the court owe certain ethical duties and have certain responsibilities towards the administration of justice. They have to uphold the Constitution, and due administration of justice.

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[38] Madhuku ***op cit*** note 1 page 119
[39] Redgment ***op cit*** note 35 page 71
[40] Ibid
[41] Ibid

8.4.4 The Public Prosecutor

This is a court official appointed by virtue of the Criminal Procedure and Evidence Act to represent the Prosecutor-General in the conduct of all prosecutions in the Magistrates Court, subject to his directions.[42] The public prosecutor decides whether a person should be charged with an offence and presents the case against the accused on behalf of the State in a court of law. He also prepares the prosecution case and is responsible for securing the attendance at court of the accused and witnesses for the trial.[43] He has an ethical duty to disclose all evidence in his possession that is favourable to the accused.[44]

8.4.5 The Presiding Officer

The magistrate is the presiding officer in all cases at the magistrate's court. His function is to do justice between the two adversaries' i.e. the State on the one hand and the Accused on the other. He does this by listening to the evidence from both sides makes findings of fact and apply the relevant law to the factsfound before arriving at a decision. He has the duty to control the proceedings and conduct the trial in an impartial manner.[45]

8.4.6 The Defence Lawyer

An accused person may be represented by a legal practitioner of his own choice. This right to legal representation is enshrined in the Constitution

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[42] Section 11 (1) of the Criminal Procedure and Evidence Act
[43] Ibid
[44] ***Smyth v Ushewokunze and Another*** 1997 (2) ZLR 544 at 549 (s)
See also ***R v Banks*** [1916] 2KB 621 at 623
See also ***R v Riekert*** 1954 (4) SA 254 (SWA) at 261 C - E
See also ***S v Munukwa and Others*** 1982 (1) ZLR 30
See also ***S v Ndlovu*** 1981 ZLR 618 (S).
[45] Feltoe ***opcit*** note 7 page 2.
See also ***S v Musindo*** 1967 (1) ZLR 395 (H)
See also ***Attorney-General v Slatter and Others*** 1984 (1) ZLR 306 (S).

which provides that a person who is charged with a criminal offence shall be permitted to defend himself in person or; save in proceedings before a local court, at his own expense by a legal representative of his own choice.[46]

A legal practitioner is a special kind of agent who, under the law of agency, owes certain duties to his client (the principal), which include, the need for the utmost good faith, confidentiality,avoiding conflicts of interest, and accounting to his principal.[47] In addition, he has common law ethical duties that include allegiance to the State, upholding the law and to respect the court.[48]

8.4.7 The Interpreter

An Interpreter is responsible for interpreting into English language, everything that is said, in court, in a language other than English. English is the official language. Thus an accused is entitled to have, free of charge, the services of an Interpreter at his trial if he so wishes.[49]

The Interpreter occupies a position of great responsibility and trust because his interpreted version of the testimony becomes the official record of proceedings.This record must, therefore, be free from errors, which may prejudice the administration of justice as appealsto superior courts are based on the official record of the proceedings. An Interpreter does not simply translate from one language into another, as he must convey the idea or meaning intended by the speaker.[50]

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[46] Section 70(d) of the Constitution of Zimbabwe

[47] Reynolds, D.A. (1983) ***An Introduction to Law*** Ministry of Justice, Harare, pages 74-75.

See also generally the Duties of a Legal Practitioner Under The Legal Practitioners' Act [Chapter 27:07] Madhuku ***op cit*** note 1 page 84.

[48] Ibid

[49] Section 70 (j) of the Constitution of Zimbabwe

[50] Reynolds ***op cit*** note 47 pages 76-77.

8.4.8 Relevant Documentation

The following documentation is of some significance in criminal trials –

- The docket
- Charge sheet
- State outline/Defence outline
- Court record

8.4.9 The Docket

When a matter is reported to the police and they commence their investigations, all documents concerning records of their investigations (initial reports, statements made by suspects and witnesses, investigating diaries, documentary exhibits e.g. forged cheques, receipts, etc.) are kept in a "docket".[51] When investigations are complete, the docket is sent to the public prosecutor, who peruses it and decides whether there is sufficient evidence to arraign the suspect. Each docket has a reference number, which is very useful when making inquiries about the case.[52]

8.4.10 Charge Sheet

This is a document prepared either by the police or the public prosecutor containing and detailing all the essential averments against the accused. It should contain a properly drafted charge which briefly spells out the offence accused is charged with.[53] The charge should not be defective.

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[51] Rowland, J.R. (1997) ***Criminal Procedure In Zimbabwe*** Legal Resources Foundation Harare.
See also Rowland, J.R (1992) ***Prosecutors' Handbook*** Third Edition Legal Resources Foundation Harare page 14.
[52] Ibid
[53] Section 146 of the Criminal Procedure and Evidence Act

8.4.11 State Outline

This is a statement drawn by the prosecutor wherein he or she gives brief details of the nature of the prosecution case and the material facts on which the prosecution rely upon as supporting of their allegations against the accused.[54] There should be a ***nexus*** or causal link between the offence and the alleged conduct of the accused.[55]

8.4.12 Defence Outline

It is a statement made by the accused or on his behalf by his defence lawyer outlining the nature of his defence and the material facts upon which reliance is placed as supporting the defence.[56] It is presented to the court after the reading of the charge and state outline.[57] The court should explain provisions of the defence outline procedure to an unrepresented accused person.

8.4.13 Court Record

Magistrates' Courts are courts of record, meaning that the magistrate must keep a written record of all relevant court proceedings.[58] The clerk of court is the custodian of the court record and must secure it safely. Where the court record goes missing before the conclusion of a case, the clerk of court has a duty to reconstruct the record, from the best secondary evidence available. The Clerk must reconstruct the record under the direction and supervision of the magistrate. Where the record goes missing after the trial has been completed, the trial magistrate is ***functus officio*** (has finished dealing with the matter) and the clerk of court must therefore depose to an affidavit stating that the record has been lost and

[54] Section 188(d) of the Criminal Procedure and Evidence Act
[55] Feltoe ***op cit*** note 7 page 70.
[56] Section 188(b) of the Criminal Procedure and Evidence Act
[57] Feltoe ***op cit*** note 7 page 15.
[58] Ibid

proceed to reconstruct the record by obtaining from the magistrate, witnesses and others present as to the contents thereof.[59] Each record has a Criminal Record Book Number for reference.

8.5 The Uncontested Trial

8.5.1 The Plea of Guilty Procedure

This is governed by the Criminal Procedure and Evidence Act.[60] It provides for two distinct and separate procedures to be followed in the event of an accused tendering a plea of guilty in answer to a charge. As to which procedure is to be adopted will mainly be dependant on the nature of sentence that the offence charged is likely to attract.[61]

8.5.2 Criteria used to decide which procedure to adopt

The decision as to whether to proceed in terms of either subsection lies with the magistrate. Where the court is of the opinion that the offence with which the accused is charged does not merit a sentence of imprisonment or a fine in excess of level three the procedure used is that provided for under Section 271(2)(a).[62] In practice the prosecution normally advises the court to proceed in terms of one of the subsections.

8.5.3 The procedure under Section 271(2) (a)

It provides for a summary procedure. In practice the prosecutor expressly requests the court to proceed under subsection 2(a). The charge is put to the accused and he is asked his attitude to the charge. If he tenders a guilty plea in answer to the charge, the prosecutor will proceed and

[59] Section 271 of the Criminal Procedure and Evidence Act
[60] Section 271 (2) (a) and 271 (2) (b) of the Criminal Procedure and Evidence Act
[61] Section 271 (2) (a) of the Criminal Procedure and Evidence Act
[62] Ibid

verbally give brief facts relating to the criminal acts or omissions committed by the accused.[63]

If the court is satisfied that the brief facts presented by the prosecutor amount to or constitute the offence charged, it will proceed to summarily convict the accused by entering a guilty verdict. Following the entering of a guilty verdict, the accused will be invited to make submissions in mitigation. After recording the submissions in mitigation the court passes sentence on the accused. This brings the proceedings to finality. The court cannot impose a sentence of imprisonment or a fine in excess of level three.[64]

8.5.4 The procedure under Section 271 (2) (b)

Although this is also an abbreviated form of a trial, it is more elaborate than that provided for by subsection 2(a). Generally speaking this procedure is used when dealing with serious offences.[65] It requires that the magistrate thoroughly satisfy himself that the accused is genuinely and understandingly admitting to the offence charged. This procedure is used in circumstances where the magistrate is of the opinion that the offence is serious enough to warrant either imprisonment or a fine in excess of level three as punishment.[66] Or put differently it does not merit a sentence prescribed in terms of subsection 2(a). The offence may be less serious but the prosecutor would have knowledge of accused's record of previous conviction which he would divulge to the court upon conviction.

8.5.5 Whatthen is involved in this procedure?

The prosecutor will put the charge to the accused and if in answer to the charge the accused tenders a guilty plea the prosecutor is required to

[63] Ibid
[64] Section 271 (2)(b) of the Criminal Procedure and Evidence Act
[65] Section 271 (2)(b) of the Criminal Procedure and Evidence Act
[66] Section 271 (2)(b) of the Criminal Procedure and Evidence Act

give a detailed statement of agreed facts. That is a statement detailing the relevant acts or omissions that the accused committed and that support the charge preferred against him.[67]

This statement must be given ***viva voce*** (orally or by spoken word) to the court and it is important to ensure that the accused hears and understands the same. Thus, where necessary there must be simultaneous interpretation of the statement of agreed facts.

8.5.6 The duty of the court

After the prosecutor has read the statement of agreed facts the court is obliged to do two things – (a) explain the charge and the essential elements of the offence to the accused except where the accused is represented.

(b) inquire from the accused whether he understands the charge and the essential elements of the offence and whether his plea of guilty is an admission of the elements of the offence and of the acts or omissions stated in the charge or by the prosecutor.[68]

Although these two requirements are separate and must both be satisfied, in practice, the court deals with them together under the inquiry procedure, which is essentially a question and answer procedure.

The magistrate must ensure that the charge is clearly formulated and properly laid before it is put to the accused. The correct section of the statute should also be made if it is a statutory offence.[69]

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[67] Section 271 (2)(b) of the Criminal Procedure and Evidence Act Rowland (1997) ***op cit*** note 51, 10-5.
See also ***S v Chamurandi*** HH – 182-86.
See also ***S v Vhere***HH – 211-86.
See also ***S v Zvinyenge and Others*** 1987 (2) ZLR 42(S).
See also 1995 (2) ZLR 337(S).
[68] Reynolds ***op cit*** note 47 pages 82-83. Madhuku ***op cit*** note 1 page 118.
Feltoe ***op cit*** note 7 pages 57-58.
[69] Madhuku ***op cit*** note 1 page 118. Rowland (1997) ***op cit*** note 51pages 16-16 and 16-25. Feltoe ***op cit*** note 7 page 61.
See also ***S v Choma*** 1990 (2) ZLR 33 (H).

8.6 The Contested Trial

This is where an accused denies the charge levelled against him. The prosecutor starts the trial by putting the charge to the accused, informing him what crime the state alleges he committed and where and how it is alleged he committed it. This is called the arraignment stage. The court must fully explain the charge to an unpresented accused person if he is not represented.

Next the accused is asked by the magistrate to answer to the charge. He may plead guilty in which case the procedure described under uncontested trial will be followed or he may plead not guilty. This is called the plea stage.[70] Accused may also tender pleas of ***autrefois*** acquit or convict.

This special plea implies that he was either tried of the same offence by a court with competent jurisdiction and he was either acquitted or convicted. Accused may also aver that the court has no jurisdiction to try him. Where he has tendered a plea of not guilty the prosecutor will commence the proceedings by reading out the outline of the state case.

Thestate outline informs the magistrate and the accused what crime the state alleges it will prove against the accused and details the facts which the prosecutor will use to do this.[71] After the prosecutor has outlined his case, the magistrate will ask the accused to make a statement outlining his defence, detailing the facts which he will rely on as supporting his defence.[72]

8.6.1 Presentation of the state case:

The prosecutor's task is to convince the magistrate, beyond doubt that the accused is guilty of the crime charged.[73] He does this by calling

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[70] Madhuku ***op cit*** note 1 page 119 Rowland (1997) ***op cit*** note 51pages 16-21 and 16-34.
See alsoSection 188(a) and (b)of the Criminal Procedure and Evidence Act
See also ***S v Dube*** S-25-92.
See also ***S v Muleya*** 1992(1) ZLR 68(4).
[71] Madhuku ***op cit*** note 1 page 119.
[72] Reynolds ***op cit*** note 47 pages 83, 85 and 86.
[73] Reynolds ***op cit*** note 47 pages 83-84. Rowland (1997) ***op cit*** note 51, 18-28.
Feltoe ***op cit*** note 7 page 72.

witnesses to testify as to their knowledge of the case. The prosecutor guides each witness called in the narration of their story. This stage is called **examination-in-chief**.[74] The accused is then given an opportunity to put questions to each witness after he has completed giving their evidence-in-chief. The purpose of the questions is to test or challenge the veracity of the witness's testimony. This stage is called **cross-examination**.[75]

After cross-examination is finished the prosecutor is permitted, through questions, to clarify from the witness certain matters that may have arisen during cross-examination. This is called **re-examination**.[76]

After the prosecutor has called all his witnesses he will formally inform the magistrate that he is closing the State case.The defence has an option of applying for a discharge at the close of the state case. If application is granted accused is entitled to a verdict of not guilty and is acquitted. If the application is dismissed accused is placed on his defence.[77]

8.6.2 Presentation of the defence case

After the State case is closed the accused will be called upon to open his case. He presents his case by leading evidence from defence witnesses, who also go through similar stages like the witnesses called by thestate.[78] It is important to remember that unless with the leave of the court, the accused must himself give his evidence before any other defence witness

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[74] Reynolds ***op cit*** note 47 pages 84-85. Madhuku ***op cit*** note 1 page 119. Rowland (1997) ***op cit*** note 51, 16-31. Feltoe ***op cit*** note 7 pges 72-73.
See also ***S v Manyika*** HH – 215-02.
See also ***S v Ramalope*** 1995 (1) SACR 616 (A).
[75] Reynolds ***op cit*** note 47 page 85. Rowland (1997) ***op cit*** note 51, 18-28.
Feltoe ***op cit*** note 7 pages 73-74.
[76] Madhuku ***op cit*** note 1 page 120 Reynolds ***op cit*** note 47 pages 85-86. Rowland (1997) ***op cit*** note 51, 16-32, 8-3. Feltoe ***op cit*** note 7 pages 88-90.
See also ***S v Ruzani*** HB – 63-84.
See also ***S v Tsvangirai and Others*** HH – 119-03.
See also ***S v Hartleyburg and Another*** 1985 (1) ZLR 1 (H)
See also ***Attorney-General v Bvuma*** 1987 (2) ZLR 96(S).
[77] Madhuku ***op cit*** note 1 pages 120-121. Reynolds ***op cit*** note 47 pages 86-87.
[78] Madhuku ***op cit*** note 1 pages 120-121

is called to testify.[79] Upon completion of the defence case the accused will formally close the defence case. Both the public prosecutor and the accused or his legal practitioner has the right to address the court in a bid to persuade the court to retain a verdict in his favour. Arguments can be on facts or legal points.[80]

8.6.3 Judgment or verdict

When both sides have closed their respective cases the magistrate will consider the totality of the evidence and determine whether the evidence shows beyond reasonable doubt that the accused committed the crime charged.[81]

If that is the case he will find the accused guilty (this is referred to as a "**conviction**"). If not he will pronounce the accused not guilty (this is referred to as an "**acquittal"**).[82]

8.6.4 Sentence

In the event of a conviction, the magistrate will next hear submissions in aggravation and mitigation of sentence, from the prosecutor and the defence respectively.[83]

After weighing both mitigating and aggravatory factors and sometimes special circumstances of the case, the magistrate will determine the appropriate sentence for the convicted accused. This is what is called

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[79] Madhuku ***op cit*** note 1 page 121. Reynolds ***op cit*** note 47, pages 87-88.
[80] Madhuku ***op cit*** note 1 page 121. Reynolds ***op cit*** note 47 pages 87-88.
[81] Madhuku ***op cit*** note 1 page 121. Madhuku ***op cit*** note 1 pages 121-122. Feltoe ***op cit*** note 7 pages 138-141.
See also Feltoe, G (1990) ***A Guide to Sentencing in Zimbabwe*** Legal Resources Foundation, Harare pages 78- 82.
See also ***S v Ngulube*** HH – 37-03.
See also ***S v Shariwa*** HB – 38-03.
See also ***S v Manyevere*** HB – 30-03.
See also Story, G (1978) ***Rhodesia Criminal Practice*** University of Rhodesia, Salisbury.
[82] Reynolds ***op cit*** note 47, pages 88-94.
[83] Madhuku ***op cit*** note 1 pages 121-122.
Feltoe ***op cit*** note 7 Chapter 8.

the **sentencingstage**.[84] Criminal law provides for the different types of sentence that a court can impose on a convicted person. The most common terms of sentenceinclude imprisonment, fine and community service.[85] The list is not exhaustive.After sentence has been pronounced the case is said to have come to finality, subject to appeal, reviewor scrutiny by a higher court.

[84] Feltoe ***op cit*** note 7 Chapter 8.
[85] Story, G (1978) ***Rhodesia Criminal Practice*** University of Rhodesia, Salisbury.

CHAPTER 9

Fundamentals of Civil Procedure and its Nature

9.0 Introduction

Paterson, T.J.M[1] in his book Principles of Civil Procedure In the Magistrates Courts noted that the Law can be divided into two main branches. These are substantive and procedural or adjectival law.[2] Substantive law entails the body of law generally accepted;

> *"binding legal norms which apply to society and regulate it. This body of law defines the content of the legal rights and duties which exists between legal subjects and their relationship to things"*[3]

The author went on to point out that procedural law, on the other hand, is that body of legal rules which determines how such rights and duties are protected and enforced within the community.[4] The courts therefore have the constitutional mandate to protect and enforce such rights. No man is allowed to take the law into his own hands, hence it is of paramount importance that disputes are peacefully resolved through the courts.
Civil procedure is part of adjectival law.[5] It entails legal rules and regulations which govern litigants in civil suits.[6] In other words these are rules and regulations which regulate how legal rights in civil cases are protected and enforced. It covers all steps a litigant has to take from the date a wrong (which is enforceable civilis) is done to the time the

[1] Paterson, T.J.M (2012) ***Eckard's Principles of Civil Procedure In the Magistrates' Courts***, Fifth Edition Juta and Company Ltd Claremont page 6.
[2] Ibid
[3] Ibid
[4] Ibid
[5] Ibid
[6] Ibid

person gets due redress through civil courts. This can be through summons commencing action or an application.[7]

A person who wishes to institute legal proceedings will have to decide in which court to sue. This decision is firstly governed by the nature of the claim.[8]Secondly it is governed by the relief sought.[9] It is therefore unwise to issue summons in a court which has no power to deal with the case. It would be a waste of time and resources, for example, to issue divorce summons in the Magistrates'Court in a matter in which the marriage in issue was solemnized under the Marriages Act [Chapter 5:11]. One also risks to be visited with costs on a higher scale in such a scenario where summons are erroneously issued in the wrong court.[10]

Unlike the High Court which has inherent jurisdiction in all civil matters, the Magistrate court is a creature of statute.[11] Its powers and mandate are confined to the four corners of the Act. The Magistrate Court Act defines the powers of the magistrates and the specific cases they are supposed to deal with in respect of their jurisdiction.[12] It is therefore important for all court officials, and litigants to be alive to the jurisdictional provisions in order to avoid embarrassment and being taken advantage of by other court users. Clear knowledge of the court's limits on jurisdiction will assist legal practitioners to give proper advice to their clients. This is in light of the fact that the magistrate's court has no jurisdiction in certain civil matters.[13] The procedure in civil matters in the high court is sometimes different with that in the Magistrates'Court. This chapter will examine the procedure in the Magistrates'Court with reference to higher court cases which form precedent.

As noted by Paterson[14] the purpose of procedural law is to do justice between the parties. As a result every decision in civil procedure revolves around this principle.[15] Failure to follow the correct procedure can result in miscarriage of justice.

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[7] Madhuku, L (2010) ***An Introduction to Zimbabwean Law***, Weaver Press, Harare page 108.
[8] Ibid
[9] Madhuku ***op cit*** note 7 page 108
[10] Rubin, L. (1949) ***The Law of Costs In South Africa*** Juta Johannesburg page 168. See also ***Mahembe v Matombo*** 2003 (1) ZLR 149(H) at 18 E-F.
[11] Section 11 of the Magistrates Court Act [Chapter 7:10].
[12] Ibid
[13] Section 14 of the Magistrates Court Act.
[14] Paterson ***op cit*** note 1 page 6
[15] Ibid

It can also be a ground for review by the higher courts on procedural irregularity. The court should therefore adhere to the rules of procedure.

9.1 The Distinction between Civil and Criminal Procedures

Private parties institute civil proceedings while criminal proceedings are initiated by the state through the Prosecutor-General.[16] This stems from the fact that civil wrongs are between parties while criminal wrongs are an affront to the whole nation. The state therefore initiates criminal proceedings on behalf of the society.[17] The remedy in civil proceedings is to have one party, usually the defendant held liable.[18] In criminal proceedings the state seeks to have the accused person convicted of the offence charged after leading evidence which shows the commission of an offence beyond any reasonable doubt of the court.[19] Civil proceedings are commenced by way of the summons commencing action or by way of an application.[20] Criminal proceedings are commenced upon the arrest of the suspect. The standard of proof in criminal proceedings is beyond any reasonable doubt while in civil cases is on a balance of probabilities.[21]

9.2 The Distinction between Trial and Application Procedures

There are two ways in which a person can proceed in the civil court. An aggrieved person can either proceed under an application on motion procedure or under the action or trial procedure. If there are material facts or issues in dispute it is better to proceed under the action or trial procedure.[22] If there are no material disputes of fact the best avenue is through an application.[23] One must be careful in the choice of procedure. The use of the wrong procedure may result in one incurring costs.

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[16] Madhuku ***op cit*** note 7 pages 36-39.
[17] Ibid
[18] Ibid
[19] Ibid
[20] Ibid
[21] ***ZESA v Dera*** 1998(1) ZLR 500 (S) and at 503-4 per McNally JA (as he then was).
[22] Paterson ***op cit*** note 1 page 42.
[23] Ibid

Generally most proceeding take the action procedure if there are disputed facts which require clarification by ***viva voce*** evidence tested by cross-examination.

On the other hand all interlocutory matters should be by way of motion. Where there is no dispute of fact (material fact) and issues are straightforward the application procedure is preferred because it is quicker than the action procedure.

9.3 Jurisdiction

When a person decides to litigate he must first of all select the proper court in which to proceed.[24] The decision and selection must be determined by whether the matter lies within the competence of the Magistrates' Court or can only be entertained by a higher court.[25]It is not prudent to proceed in the Magistrate Court where the matter can be entertained by the High Court. The Magistrate Court can decline jurisdiction on that basis.[26]

Having selected the proper court the litigant must also decide upon the proper provincial jurisdiction he must take the matter to.

This is in respect of where the cause of action arose from.[27] The litigant must be sure whether the court he has chosen has the jurisdiction to entertain the matter.

The word 'jurisdiction' is capable of a number of meanings.[28] Here it will be used as meaning the power or competence which a particular Zimbabwean inferior or in particular a Magistrates' Court has to hear and determine an issue between parties brought before it.[29] Generally the Magistrates' Court has jurisdiction in respect of:

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[24] De Villiers Van Winsen, L and Thomas, JD (1996) Herbestein and Van Winsen: ***The Civil Practice of the Superior Courts In South Africa*** Second Edition Juta and Company, Limited Cape Town page 22.
See also ***Swanepoel v Roelofz and Others*** 1953(2) S.A. 524(W).

[25] ***Swanepoel v Roelofz and Others*** 1953(2) S.A. 524(W). ***Courts In South Africa*** Sixth Edition pages 34-5.

[27] De Villiers Van Winsen and Thomas ***op cit*** note 24.

[26] Erasmus, H.J and Van Loggerenberg D.E (1991) Jones and Buckle: ***The Civil Practice of the Magistrates'***

[28] Ibid
See also ***Graaff – Reinet Municipality v Van Ryneveld's Pass Irrigation Board***, 1950 (2) S.A 420 (A.D) at 424.

[29] Sections 8 and 11 of the Magistrates Court Act

(i) Any person who resides, carries on business or is employed within the province where that court is situated.
(ii) Any partnership where business premises are situated, any member where of resides, within the province.
(iii) Any person who institute proceedings in that court.
(iv) Where the cause of action arose is within the province.[30]

The Magistrates' Court shall not have jurisdiction in or cognizance of any action or suit wherein

(a) Is sought:-
(i) The dissolution of a marriage, other than a marriage solemnized in terms of the Customary Marriages Act [Chapter 5:07] or
(ii) Separation from bed and board or of goods of spouses of a marriage other than a marriage solemnized in terms of the Customary Marriages Act [Chapter 5:07] or
(iii) A declaration of nullity in relation to a marriage, other than a marriage solemnized in terms of the Customary Marriages Act [Chapter 5:07]; or

(b) The validity or interpretation of a written will or other testamentary documents is in question; or
(c) The status of person in respect of mental capacity is sought to be affected.[31]

The Magistrates' Court does not have jurisdiction where the specific performance of an act is sought without an alternative of payment of damages. There are however exceptions to this provision. In addition the court does not have jurisdiction where a decree of perpetual silence or provisional sentence is sought. It is not within the existing court's contingent right or obligation. This is also subject to certain exceptions.

[30] Section 11-13 of the Magistrates Court Act
[31] Section 14 1(a)-(c) of the Magistrates Court Act

Further the court does not have jurisdiction in any case relating to the validity, effect or interpretation of an oral will made in terms of section 11 of the Wills Act [Chapter 6:06]. There are however exceptions also to this provision.[32]

The Magistrates' Court may hear cases only where the quantum of the claim is within certain limits. If the claim exceeds these limits the plaintiff may either proceed in the high court or abandon a portion of the claim to meet the jurisdiction.[33]

It must be remembered that the monetary jurisdiction of the Magistrates' Court is not always static. It is imposed from time to time after being revised by the responsible Minister. It is unlike the High Court which has unlimited monetary jurisdiction in civil matters.[34] Parties can however consent to the jurisdiction of the Magistrates' Courts where the amount involved exceeds the set amount for the court to entertain.[35]

An example of such consent to jurisdiction can be found in various contracts of hire purchase where parties expressly consent to the jurisdiction of a specific Magistrates' Court in the event of litigation arising from such an agreement.[36] Another vital factor to consider is the prescription period. A case can be declined if it is proved by the other party that it is prescribed.

There are prescribed periods whereby certain claims should be brought before the civil courts.[37] Once the issue of jurisdiction has been determined the next step is to proceed by way of action or trial procedure or by way of application or motion procedure. The law may provide that certain actions be made by application. An example is of all interlocutory matters which should be made by motion.[38]

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[32] Section 1(d)-(g) and (2)(a)-(e) of the Magistrates Court Act
[33] Paterson ***op cit*** note 1 page 27
See also 11 Section 11(I) (h) of the Magistrates Court Act
[34] Paterson ***op cit*** note 1 page 27
See also ***Truck and Car Co (Pty) Ltd v Ewart*** 1949(4) SA 295(T)
See also ***Skead v Swanepoel*** 1949(4) SA 763 (T)
See also
Section 11(I) (c) of the Magistrates Court Act
[35] Paterson ***op cit*** note 1 pages 31-32.
[36] Sections 11(i) (a) (iv) and 11 (i) (b) (iii) of the Magistrates Court Act
[37] Sections 3 (c) 16 (i) and 17(i) (c) of the Prescription Act [Chapter 8:11].
See also ***Chirinda v Konrad Van Der Merwe and Another*** HH – 51-13.
See also ***Tarwireyi v Kunene and Another*** HH 19-08.
See also ***Chavengerwa and Another v Mutyanda and Another*** HH 672-08.
[38] Order 23 Rule 1 and 2 of the Magistrates Court of Zimbabwe (Civil) Rules, 1980.

9.4 Civil Action and Trial Procedure

9.4.1 Structure and Stages of a Civil Action

The general structure and stages of a civil action starts with a letter of demand in certain cases and ends with enforcement of judgment. The involvement of the court normally starts with summons commencing action.[39]

This is followed by an appearance to defend.[40] The next stage is that of a notice to plead followed by defendant's plea.[41] This is followed by plaintiff's reply (replication), joinder of issues then discovery of documents.[42] A pre-trial conference follows then set down and trial proper.[43] Other stages in between may involve the request for further particulars before pleading or an application for summary judgment where plaintiff is of the opinion that defendant has no defence and only entered an appearance to defend for the purpose of delay and to frustrate his claim.[44] It is important to note that all the civil proceedings are party driven.

9.4.2 Letter of Demand

A letter of demand is usually sent when one has tried unsuccessfully to get a claim such as an invoice paid. It is a warning of serious legal action if the claim is not met.[45] Such claim among others can be for a debt owing or arising from delict. It can be a claim for damages arising from a road traffic accident or adultery. A letter of demand is often the final reminder before taking legal action. This can be send by the party himself or instruct a legal practitioner to do so on his behalf. It can be served to a person or organization who owe money as the case maybe. It is not

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[39] Order 8 Rule 1of the Magistrates Court of Zimbabwe Civil Rules
[40] Order 10 of the Magistrate Court of Zimbabwe Civil Rules
[41] Order 11 Rule 3 and Order 16of the Magistrate Court of Zimbabwe Civil Rules
[42] Order 17 and Order 18of the Magistrate Court of Zimbabwe Civil Rules
[43] Order 19 Rule 1of the Magistrate Court of Zimbabwe Civil Rules
[44] Order 15of the Magistrate Court of Zimbabwe Civil Rules
[45] De Villiers Van Winsen and Thomas o***p cit*** note 24 page 99.
See also ***Reichann v Ysebrand and Co***. 1940 O.P.D 148.

mandatory that one would need a legal practitioner to write a letter of demand. One can draft his own letter and deliver it in person or via other means such as the post office. The letter serves as a warning that if payment of the money owed is not met within a specified period the plaintiff will institute legal proceedings.

There are certain prior agreements that before instituting legal proceedings, a party should write a letter of demand first.[46]

In other cases it is not a legal requirement that a letter of demand should be written first. After receiving a letter of demand a defendant can pay, thereby avoiding the rigorous legal process. If he ignores to pay the plaintiff can commence action in the magistrate court through summons.

9.4.3 Summons Commencing Action

Legally, a summons (also known in England and Wales as a Claim Form and in the Australian State of new South Wales as a Court Attendance Notice) is a legal document issued by a court for various purposes.

It is the document that officially starts a lawsuit in an action.[47] It must be in a form prescribed by the law governing procedure in the court involved. As court process, it must be properly served on, or delivered to the defendant.[48]

In Zimbabwe, proceedings in the Magistrates' Court are normally commenced by way of action.[49] There are however certain provisions which require the use of application procedure.[50] Summons are process of the court for commencing an action and calling upon the defendant to enter an appearance within a stated time after service to answer the claim of the plaintiff.[51]

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[46] Ibid See ***Hooper v de Viiliers*** 1934 T.P.D at 202.
See also ***Butter v NogelCortage*** Co 1933 T.P.D. at 220.
See also ***Havenga v Lotter*** 1921 T.P.D. 397.
See also ***Booi v Blake*** 1877 Buch 113.
[47] Order 8 Rule 1of the Magistrates Court of Zimbabwe Civil Rules
[48] De Villiers Van Winsen and Thomas ***op cit*** note 24 page 130. Erasmus and Van Loggerrenberg ***opcit*** note 26 page 14.
[49] Order 8 Rule 1of the Magistrates Court of Zimbabwe Civil Rules
[50] Sections 12 and 13of the Magistrates Court of Zimbabwe Civil Rules
[51] Order 8 Rule 1(a)of the Magistrates Court of Zimbabwe Civil Rules

It also warns the defendant of the consequences of failure to do so.[52] The ***dies induciae*** or period upon which the defendant must enter an appearance is seven days if the defendant resides within the jurisdiction.[53] It is fourteen days where the defendant does not reside within the jurisdiction of the court from which the summons is issued.[54] The calculation of the days as prescribed by rules does not include Saturdays, Sundays and public holidays. The summons shall be issued by the clerk of the court and bear the date of issue.[55] The summons is defective if it does not meet such requirement.[56] The original copy of the summons shall at all times be retained of record in the office of the clerk of court. It bears the issue number for reference purposes.

9.4.4 Particulars of Claim

As noted by Paterson[57] particulars of claim set out the basis of the action and the relief sought by plaintiff. *"The plaintiff, in other words, gives a description of the facts that give rise to the claim."*[58]

Plaintiff's prayer comes at the end of his particulars of claim. After such brief summary justifying the claim the plaintiff will state the prayer or relief sought which is usually in monetary form, e.g. for a debt of goods delivered to the defendant or quantum of damages arising from a delict or contract. The particulars of claim must disclose a cause of action.[59] The claim should otherwise be recognized at law.

The particulars of claim are important in that they allow the defendant to know the exact nature of the claim and how to respond to the summons.

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[52] Order 8 Rule 1(b) of the Magistrates Court of Zimbabwe Civil Rules
[53] Order 8 Rule 2(a) of the Magistrates Court of Zimbabwe Civil Rules
[54] Order 8 Rule 2(b) of the Magistrates Court of Zimbabwe Civil Rules
[55] Order 8 Rule 3 of the Magistrates Court of Zimbabwe Civil Rules
[56] Order 8 Rule 4 of the Magistrates Court of Zimbabwe Civil Rules
[57] Paterson ***op cit*** note 1 pages 85 - 88
[58] Ibid
[59] Paterson ***op cit*** note 1 pages 85 - 88
See also ***Liquidations Wapejo Shipping C. Ltd v Lurie Brothers*** 1924 AD 69 at 74.
See also ***Brits v Coetzee*** 1967 (3) SA 570 (T).
See also ***Mauchaza v Nota*** HHCA 204/07 [2012] ZWHHC 120

The particulars of claim must be clear and not vague or embarrassing in nature.[60]

The plaintiff must show the following particulars in his claim:

(i) The nature and amount of claim and where it arises from.[61]
(ii) The rate of interest and amount thereof claimed to the date of full and final payment.[62]
(iii) The amount, which if the action is not defended is claimed for legal practitioners and court fees.[63]
(iv) Any abandonment of part of the claim.[64]
(v) Any set off.[65]

It must be noted that where the summons contains more than one claim, the particulars of each claim and the relief sought in respect thereof should be stated separately.

9.4.5 Service of Court Process

Documents that are court process such as summons commencing action or summons for civil imprisonment are served by the messenger of court in the Magistrate Court and sheriff ordeputy sheriff in the High Court.[66] Process is defined as any document which is required to be served on any person in terms of the rules.[67]

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[60] Madhuku ***op cit*** note 7 page 109.
See also ***Matambanadzo Bus Service (Pvt) Ltd v Magner*** 1972 (1) SA 198 (RA) at 199-200.
See also ***Sanyangowe v Chalimba and others*** HC344/12.
See also ***Franchi v Mohammed*** HC 2269/03 [2005] ZWHHC 17
[61] Order 8 Rule 3 (1) (a) of the Magistrates Court of Zimbabwe Civil Rules
See also ***Pilkington and Company v Hayne and Company*** (1904) 25 NLR 172.
[62] Order 8 Rule 3(1) (b) of the Magistrates Court of Zimbabwe Civil Rules
[63] Order 8 Rule 3(1) (c) of the Magistrates Court of Zimbabwe Civil Rules
[64] Order 8 Rule 3(1) (d) of the Magistrates Court of Zimbabwe Civil Rules
[65] Order 8 Rule 3(1) (e) of the Magistrates Court of Zimbabwe Civil Rules
[66] Madhuku***op cit*** note 7 page 109of the Magistrates Court of Zimbabwe Civil Rules
See also ***Marimo v Mpofu*** HB 99-04 De Villiers Van Winsen and Thomas ***op cit*** note 24 page 197.
[67] Order 7 Rule 1(1) of the Magistrates Court of Zimbabwe Civil Rules

The rules specify the manner of service of process. The rules specifically provide for:

(i) When process may be served.[68]
(ii) Manner of service of process.[69]
(iii) Service where person to be served prevents service or cannot be found.[70]
(iv) Service on two or more persons.[71]
(v) Service by registered post.[72]
(vi) Service of process where ejectment or payment of rent is sought.[73]
(vii) Proof of service.[74]
(viii) Change of the address for service.[75]
(ix) Service by telegraph or facsimile.[76]
(x) Substituted service[77]
(xi) Minimum time for service of process in particular cases.[78]
(xii) Postal service[79] and
(xiii) Service of process in proceedings against states.[80]

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[68] Order 7 Rule 4of the Magistrates Court of Zimbabwe Civil Rules
See also ***Estate Fraser v Smit*** 1915 C.P.D 369.
See also ***Salkinder v Magistrate of De Aar and Another*** 1931 C.P.D at 39.
[69] Order 7 Rule 5of the Magistrates Court of Zimbabwe Civil Rules
See also Jonas 1942 CPD 461.
See also ***Brecher v Brecher*** 1947 SA 225 (SWA).
[70] Order 7 Rule 6 of the Magistrates Court of Zimbabwe Civil Rules
See also Lister and Tocknell Winter 1906 TS 211.
See also ***Kent v Transvaalsche bank*** 1907 TS 765.
[71] Order 7 Rule 7 of the Magistrates Court of Zimbabwe Civil Rules
See also ***Estate J. Komen v Koning and Vos*** (1915) 36 N.L.R. 518.
[72] Order 7 Rule 7Aof the Magistrates Court of Zimbabwe Civil Rules
[73] Order 7 Rule 7Bof the Magistrates Court of Zimbabwe Civil Rules
[74] Order 7 Rule 7Cof the Magistrates Court of Zimbabwe Civil Rules De Villiers Van Winsen and Thomas ***op cit*** note 24 page 215.
See also ***Incorporated Law Society v Bothma*** 1962 (4) SA 177 (T) at 178.
See also ***Deputy Sheriff v Goldberg*** 1905 TS at 684.
[75] Order 7 Rule 7Dof the Magistrates Court of Zimbabwe Civil Rules
[76] Order 7 Rule 7E of the Magistrates Court of Zimbabwe Civil Rules
[77] Order 7 Rule 8of the Magistrate Court of Zimbabwe Civil Rules
[78] Order 7 Rule 9of the Magistrate Court of Zimbabwe Civil Rules
[79] Order 7 Rule 10of the Magistrate Court of Zimbabwe Civil Rules
[80] Order 7Aof the Magistrates Court of Zimbabwe Civil Rules
[81] Order 11 Rule 1of the Magistrates Court of Zimbabwe Civil Rules
See also ***MoshalGevisser (Trademarket) v Milands Paraffin Co***. 1977 (1) SA 64 N at 68.

The cited rules should be strictly adhered to. Non-compliance with the rules rendered the service invalid. It is important to note that there are certain documents such as letter of demand which are not court process. The service of such documents can be effected by delivering by hand on the address of the defendant or by registered post to the given postal address.

9.4.6 Judgment by consent

A defendant who does not wish to defend the matter may consent to judgment.[81] The defendant may also consent to judgment before the service of the summons.[82]

Consent to judgment has the advantage of saving the defendant from paying judgment costs.[83] A defendant who wishes to consent to judgment must deliver a written memorandum stating that he so consents. He should also state whether he is consenting to the whole amount or less.[84]

9.4.7 Default Judgment

Judgment may be obtained against a defendant who is in default of delivery of notice of intention to defend or of a plea timeously.[85] In other words where a defendant has failed to enter an appearance to defend and has not consented to judgment, the plaintiff may lodge with the clerk of the court a written request to have judgment entered, with costs against such defendant.[86] The sum should not exceed the amount claimed in the summons or other relief so claimed.[87] Plaintiff can also claim interest from the date of the summons to date of judgment at the rate specified in

[82] Order 11 Rule 2(a)of the Magistrates Court of Zimbabwe Civil Rules
[83] Order 11 Rules 2(b) and 3of the Magistrates Court of Zimbabwe Civil Rules
[84] Order 11 Rule 1(1) (b)of the Magistrates Court of Zimbabwe Civil Rules
[85] Order 11 Rule 2of the Magistrates Court of Zimbabwe Civil Rules De Villiers Van Winsen and Thomas ***op cit*** note 24 page 336.
[86] Order 11 Rule 2(a)of the Magistrates Court of Zimbabwe Civil Rules
[87] Order 11 Rule 2(b)of the Magistrates Court of Zimbabwe Civil Rules

the summons or that prescribed in terms of the Prescribed Rate of Interest Act.[88]

It is important to note that in all matters default judgment is a binding judgment in favour of either party. It is based on failure to take action by the other party.[89]

In most cases, it is a judgment in favour of plaintiff when the defendant has not responded to summons, has failed to deliver a plea or appear before the court.

9.4.8 Appearance to Defend

It is important to enter an appearance to defend within the prescribed period.[90] The defendant must enter an appearance to defend by filing a written memorandum with the clerk of court in which he states that he intends to oppose the matter.[91] He must also serve a copy of the memorandum on the plaintiff or the legal practitioner.[92] An appearance to defend which is filed out of time is still valid provided no request for a default judgment has been made.[93] The defendant is required to supply an address for service within fifteen kilometers of the court-house from which the summons was issued as well as the postal address.[94]

9.5 Exceptions to Summons and Pleas:

An exception is a legal objection to an opponent's pleading. It is a complaint that there is inherent defect in the pleadings.[95] Such complaint

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[88] See provisions of the Prescribed Rate of Interest Act [Chapter 8:10].
[89] See ***Mushuma v Mushonga*** CIV "A" 565/2011 [2013] ZWHHC 45
See also ***Khumalo v Mafurirano*** HCA 97-2003[2004] ZWBHC 11
[90] Madhuku ***op cit*** note 7 page 109
See also Order 11 Rule 1(a) and 1(b)of the Magistrates Court of Zimbabwe Civil Rules
[91] Madhuku ***op cit*** note 7 page 109of the Magistrates Court of Zimbabwe Civil Rules
[92] Order 11 Rule 1(b)of the Magistrates Court of Zimbabwe Civil Rules
[93] Order 11 Rule 2of the Magistrates Court of Zimbabwe Civil Rules
[94] Order 11 Rule 3(1) and (2)of the Magistrates Court of Zimbabwe Civil Rules
[95] De Villiers Van Winsen and Thomas ***op cit*** note 24 page 314.
See also ***Buthelezi v Minister of Bantu v Administration and Another*** 1961 (3) SA 256.

is taken if a pleading is vague and embarrassing or if it lacks averments which are necessary to sustain an action or defence as the case may be.[96] The main purpose of an exception is to get the pleading set right so that the matter is properly before the court.[97]

A condition precedent to taking exceptions under the rules and against summons is that the defendant shall, within seven days after entry of appearance, deliver particulars of any exception to the summons.[98]

Summons may be excepted to if it does not disclose a cause of action.[99] It can also be excepted if the claim is vague and embarrassing.[100] Plaintiff can also except to summons if it does not comply with order 8.[101] If summons is not properly served defendant can except to it.[102] Further it is a ground of exception that the copy served upon the defendant differs materially from the original.[103] Where more than one claim is made in a summons, exception may be taken to any one or more of such claims.[104]

The plaintiff may except to the defendant's plea on the ground that the plea does not disclose a defence to the claim, or the plea is vague and embarrassing or the plea does not comply with the Rules.[105] A plea may fail to disclose a defence where it does not set out what the defence is or it does not set out a defence acceptable at law.[106]

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[96] De Villiers Van Winsen and Thomas ***op cit*** note 24 page 314
See also ***Champion v JD Celliers and Co. Ltd*** 1904 TS 788 at 7901.
See also ***Estate Edwards v Sinclair*** 1918 EDL 12 at 19.
See also ***Lockhat v Minister of the Interior*** 1960 (3) SA 765 (D) at 777.
[97] De Villiers Van Winsen and Thomas ***op cit*** note 24 page 314
See also ***Barclays Bank International Ltd v African Diamond Exporters (Pty) Ltd*** (2) 1976(1) SA 100 (W) at 107.
[98] Order 14 Rule 1(1) and (2)of the Magistrates Court of Zimbabwe Civil Rules
[99] Order 14 Rule 2 (a)of the Magistrates Court of Zimbabwe Civil Rules
See also
Dharumpal Transport (Pty) Ltd v Dharumpal 1956 (1) SA 700 (A) at 706.
See also ***Miller v Muller*** 1965 (4) SA 458 (C) at 468.
[100] Order 14 Rule 2(b) of the Magistrates Court of Zimbabwe Civil Rules
[101] Order 14 Rule 2 (c) of the Magistrates Court of Zimbabwe Civil Rules
[102] Order 14 Rule 2 (d) of the Magistrates Court of Zimbabwe Civil Rules
[103] Order Rule 2 (e) of the Magistrates Court of Zimbabwe Civil Rules
[104] Order 14 Rule 4 of the Magistrates Court of Zimbabwe Civil Rules
[105] Order 16 Rule 5; 11(a) and 11(b) of the Magistrates Court of Zimbabwe Civil Rules
[106] Order 16 Rule 11 and 12 of the Magistrates Court of Zimbabwe Civil Rules
See also ***Dusheiko v Milburn*** 1964 (4) SA 648 (A) at 655
See also ***Van Eck Brothers v Van der Merwe*** 1940 CPD 357 at 360

A plea falls short of the requirements of order 16 where it constitutes a bare denial or a defence of general issue or where it fails to admit or deny or confess or avoid all the allegations in the particulars of claim.[107] It also fall short of the requirements of order 16 where it fails to clearly set out the nature of the defence, or where it fails to state the material facts on which the defence is based or where it is a plea of tender.[108]

9.6 Motion to Strike Out

As noted by De Villiers Van Winsen and Thomas[109] an application to strike out is limited to remaining scandalous, vexatious or irrelevant matter from the pleading of an opponent. It is not available as a means of trying to eliminate portions of pleading on the ground that they are vague and embarrassing.[110] The underlining factor is however that the plaintiff may move to strike out; any of two or more defences which, not being pleaded in the alternative, are mutually inconsistent.[111] The other important factor is that the plaintiff may have to strike out any argumentative, irrelevant, superfluous or contradictory matter which may be stated in a plea.[112] An exception to a plea or motion to strike out matter from a plea may be sustained by the court. If no application for amendment is made or, having been made, is refused, the court may if the plea does not discloseadefence, give judgment for the plaintiff.[113]

[107] Order 16 of the Magistrates Court of Zimbabwe Civil Rules
[108] Order 16 of the Magistrates Court of Zimbabwe Civil Rules
[109] De Villiers Van Winsen and Thomas ***op cit*** note 24 page 21.
[110] Ibid
[111] Order 16 Rule 14 (1) (a)of the Magistrates Court of Zimbabwe Civil Rules
[112] Order 16 Rule 14(1) (b)of the Magistrates Court of Zimbabwe Civil Rules
[113] Order 16 Rule 16of the Magistrates Court of Zimbabwe Civil Rules

9.7 Plea

After entering an appearance to defend the next stage is for the defendant to enter and deliver a plea.[114] A plea is the answer to the plaintiff's claim.[115] The defendant is supposed to deliver his plea within seven days after entering an appearance to defend.[116] That is if no application has been made for further particularsor for summary judgment or, for an exception or motion to strike.[117] There are basically two types of pleas. The first is a special plea and the second one is an ordinary plea. A special plea is one that raises a technical objection to the plaintiff's claim without going into the merits of the claim. Extrinsic evidence may be led in support of the special plea.

Examples include ***res judicta*** which entails a matter has already been settled in a court of competent jurisdiction, prescription, jurisdiction, ***lispendens*** which entails that the matter is already pending in a court with competent jurisdiction and ***locus standi in judicio***.[118]

The requirements of an ordinary plea or ordinary plea are set in the rules. With special pleas if defendant does not deliver his plea within seven days of entering an appearance to defend plaintiff may by notice served upon him require him to deliver the plea within the specific time after the day upon which the notice is delivered.[119] If the defendant still fails in response to such a notice to deliver the plea he shall be in default of filing such plea. Plaintiff can ***ipso facto*** (obviously) apply for default judgment.[120]

The defendant shall in his plea either tender or admit or deny or confess and avoid all the material facts alleged in the summons.[121] The plea should

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[114] Madhuku ***op cit*** note 7 page 109of the Magistrates Court of Zimbabwe Civil Rules
[115] De Villiers Van Winsen and Thomas ***op cit*** note 24 page 302.
[116] Order 16 Rule 1(1) (a) of the Magistrates Court of Zimbabwe Civil Rules
[117] Order 16 Rule 1(1)(b)(c) and (e)of the Magistrates Court of Zimbabwe Civil Rules See also ***King's Transport v Viljoen*** 1954 (1) SA 133 (C) (in respect of jurisdiction). See also ***Wolff NO v Solomon*** (1898) 15 5C 297 at 306 (in respect of *lispendens*). ***Russel v Cape Town Municipality*** 1926 CPD 93 (in respect of prescription).
[118] ***Marks and Kanter v Van Diggelen*** 1935 TPD 29 at 37 (in respect of *res judicata*)
[119] Madhuku***op cit*** note 114.
[120] De Villiers Van Winsen and Thomas ***op cit*** note 24 page 302.
[121] Ibid Order 16 Rule 2(a) and 5of the Magistrate Court of Zimbabwe Civil Rules

also state which facts are not admitted and to what extent and shall clearly and concisely state all the material facts upon which the defendant relies upon.[122] A fact admitted or deemed to be admitted is eliminated as an issue in the action.[123] In other words it becomes common cause or an undisputed fact.

9.8 Counterclaims (Claims in Reconvention)

A counterclaim or claim in reconvention is a claim made to offset another claim, especially one made by the defendant in a legal action.[124] It is a claim pleaded against plaintiff by a defendant opposing the claim of the plaintiff and seeking some relief from the plaintiff for the defendant.[125]

It can come in the form of an independent claim against the plaintiff's claim.[126] In essence a counter claim contains assertions that the defendant could have made by starting a lawsuit if the plaintiff had not already began the action.

The purpose of a counterclaim is to enable the court to give judgment at the same time hence facilitating execution.[127] A counterclaim must be filed at the same time as the plea but it must be set out separately. It is not necessary for the plaintiff to enter an appearance to defend to the claim in reconvention.[128] The particulars required for the claim in reconvention are the same as those required in the main claim. A plaintiff cannot make a counter-claim against the defendant but may if he wish apply to amend the summons.[129] A counter claim shall also not prevent the plaintiff from applying for summary judgment.[130] Where the main

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[122] Order 16 Rule 2(b)of the Magistrate Court of Zimbabwe Civil Rules
[123] Order 16 Rule 2(b)of the Magistrate Court of Zimbabwe Civil Rules
See also ***Gordon v Tarnow*** 1947 (3) SA 525 (AD).
[124] Paterson ***op cit*** note 1 pages 189 to 191.
[125] Ibid
[126] Paterson ***op cit*** note 1 page 190.
[127] Paterson ***op cit*** note 1 pages 189 - 191 Order 9 Rule 5of the Magistrates Court of Zimbabwe Civil Rules
See also ***Brunette v Stanford*** (1859) 3 Searle 225.
[128] Order 9 Rule 1(a)of the Magistrates Court of Zimbabwe Civil Rules
[129] Order 9 Rule 6of the Magistrates Court of Zimbabwe Civil Rules
[130] Order 9 Rule 4of the Magistrates Court of Zimbabwe Civil Rules

claim is withdrawn or dismissed, the claim in reconvention can still proceed as it is not affected thereby.[131]

9.9 Summary Judgment

In civil litigation summary judgment is a judgment entered by a court for a party e.g. the plaintiff summarily against the defendant without a full trial. It is a procedural device used during civil litigation to promptly and expeditiously dispose a case without trial.[132]

It is used when there is no dispute to the material facts of the case and the plaintiff is entitled to judgment as a matter of law.[133] In other words the purpose of summary judgment is to enable plaintiff with a clear and unanswerable claim to obtain judgment without going to trial. The rationale is to dispense with a defence of no substance without putting the plaintiff to the expense of a trial.[134]

The plaintiff's claim must be in accordance with the rules.[135] The claim must be easily ascertainable, clear and unanswerable.[136] This is because this procedure is drastic and does not give the other party the opportunity to be heard or to abuse procedure.[137] The procedure for applying for summary judgment is clearly set in the rules.

The application for summary judgment must be made within seven days of entering an appearance to defend or delivery of a counterclaim.[138] If the claim is not liquid, there must be an affidavit verifying the cause of action and stating that in the opinion of the deponent, the defendant has no ***bona fide*** defence and entered appearance solely for purpose of delay.[139]

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[131] Order 9 Rule 7of the Magistrates Court of Zimbabwe Civil Rules
[132] De Villiers Van Winsen and Thomas ***op cit*** note 24 page 291.
[133] Ibid
[134] Paterson ***op cit*** note 1 page 134.
[135] Order 15 Rule 2of the Magistrates Court of Zimbabwe Civil Rules
[136] Paterson ***op cit*** note 1 page 135.
[137]See***Meek v Kruger*** 1958 (3) SA 154 (T) at 158 C.
See also ***Maharaj v Barclays Bank Ltd*** 1976(1) SA 418 (A) at 423 F.
[138] Order 15 Rule 2 of the Magistrates Court of Zimbabwe Civil Rules See also ***Jones v Stones*** [1894] A.C. 122.
See also ***Isaacs v Brittain*** 1930 C.P.D 49.
[139] Order 15 Rule 2 (a)(i) and (ii)of the Magistrates Court of Zimbabwe Civil Rules See also ***Thompson v Marshall***, 41 L.T. 720.

If the claim is based upon a liquid document such as a cheque or lease agreement, the document must accompany the application.[140] A liquid document is one which speaks for itself and does not need any extrinsic evidence to prove.[141]

If the defendant does not wish to have summary judgment against him, he has three options available to him. He may pay into court to abide by the result of the action. This means that the defendant will pay into court and at the same time agree to any decision which the court will make.[142] The defendant may opt to give security to satisfy any judgment which may be obtained against him.[143] The other option available is for the defendant to oppose the application for summary judgment.[144]

He does so by filing an opposing affidavit which may be supported by oral submissions that he has a good ***prima facie*** defence.[145] The court does not consider the merits of the case at this stage.

During the hearing of the application for summary judgment plaintiff cannot adduce any evidence other than by the affidavit already filed of record.[146] Plaintiff may also not cross-examine any witness called by the defendant. Such witness may be questioned by the court and re-examine by the defendant.[147]

9.10 Further Particulars

Inorder to enable him to plead the defendant may request further particulars from the defendant after entering an appearance to defend.[148]Any party may also, by notice delivered after the pleadings are

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[140] Order 15 Rule 2(b).
[141]***Harrowsmith v Ceres Flats (Pty) Ltd***, 1979 (2) SA 722 (T)
See also ***Rich and Other v Lagerwey*** (1974) (4) SA 748 (A) at 754.
See also ***Western Bank Ltd v Pretorius***, 1776 (2) SA 481 (T) at 483.
[142] Order 15 Rule 2(1) (a)of the Magistrates Court of Zimbabwe Civil Rules
[143] Order 15 Rule 2(1) (b)of the Magistrates Court of Zimbabwe Civil Rules
[144] Order 15 Rule 2(1) (c)of the Magistrates Court of Zimbabwe Civil Rules
[145] Order 15 Rule 2(1) (c)of the Magistrates Court of Zimbabwe Civil Rules
See also ***Chambers v Jonker*** 1952 (4) S.A. 635.
See also ***Herb (Pty) Ltd v Mohammed and another***, 1965 (1) S.A. 31(T).
[146] Order 15 Rule 2(2) (a)(i)of the Magistrates Court of Zimbabwe Civil Rules
[147] Order 15 Rule 2(2) (b)of the Magistrates Court of Zimbabwe Civil Rules
[148] Order 12 Rule 2(1) (a)of the Magistrates Court of Zimbabwe Civil Rules Madhuku ***op cit*** note 7 page 109.
See also ***Tahan v Griffiths*** 1950 (3) SA 899(O).

closed, require the other party to deliver such further information in respect of any pleading as is reasonably necessary to enable that party to prepare for trial.[149] A pleading includes a summons, counterclaim, plea, reply or schedule of documents. The party so requested to furnish the further particulars shall as soon as reasonably possible deliver the information reasonably required.[150]

9.11 Replication

This is the response or reply of a plaintiff to the defendant's plea.[151] The plaintiff has an option to reply or not. Plaintiff may within seven days after the delivery of the plea deliver a statement in writing to the defendant called a reply.[152] As noted by Madhuku[153]a reply or replication is normally necessary where the defendant makes certain allegations in the plea that require a response.

9.12 Closure of Pleadings

Upon the delivery of a reply or, where no reply is delivered upon the expiration of the period limited for reply, the pleadings shall be deemed to be closed.[154] After closure of pleadings the matter can be referred for a pre-trial conference.[155]

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[149] Order 12 Rule 3(1)of the Magistrates Court of Zimbabwe Civil Rules Madhuku ***op cit*** note 7 page 109. Paterson ***op cit*** note 1 page 192.
See also ***White v Moffek Building and Contacting (Pty) Ltd*** 1952 (3) SA 307 (O) at 312.
See also ***Franchi v Mohammed*** HC 2269-03.
[150] Order 12 Rule 3(2) of the Magistrates Court of Zimbabwe Civil Rules
See also ***Malame v Zhou*** HB 85/07.
[151] Madhuku ***op cit*** note 7 page 110.
[152] Order 17 Rule 1of the Magistrates Court of Zimbabwe Civil Rules
[153] Madhuku ***op cit*** note 7page 110.
[154] Ibid
Order 17 Rule 4of the Magistrates Court of Zimbabwe Civil Rules
[155] See ***Kambadza v Mtetwa*** HC 3224/09.

9.13 Discovery

Discovery is the pre-trial stage in a lawsuit by which each part can request documents and other evidence from the other.[156] It is a phase in which each party examines the documents in the possession of the other or control of the opponent.[157] Such documents will not come as a surprise to the other party at trial. It is therefore a mechanism meant to prevent surprises at the trial.[158] The party to whom the request is made must file of record the schedule of documents with the clerk of court. He must then serve the other party with the schedule of documents within seven days of the request.[159] If privilege is sought, such documents should be listed separately.[160]

If the schedule is not delivered, the other party ought to raise that at the pre-trial conference. If there is no joy the party may apply for an order compelling delivery. A document which has not been discovered may not be used at the trial. The other party may call and use such a document in cross-examination of a witness.[161]

9.14 Pre-Trial Conference

After the course of pleadings a party who wishes to have the action brought to trial shall request the other party to attend a pre-trial conference at a mutually convenient time and place.[162] A pre-trial conference is a meeting of the parties to a case conducted prior to trial.[163] The conference is held between the parties themselves or before a magistrate.[164] The main

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[156] Madhuku ***op cit*** note 7page 110.
[157] Ibid
[158] Paterson ***op cit*** note 1 pages 194-195.
[159] Order 18 Rule 1(2).
[160] Order 18 Rule 1 (3)(a)of the Magistrates Court of Zimbabwe Civil Rules
See also ***Ferreira v Endley*** 1966 (3) SA 618 (E) at 620 to 621.
See also ***Tractor and Excavator Spares (Pty) Ltd v Groenedijk*** 1976 (4) SA (W) at 362.
[161] Order 18 Rule 1(4) of the Magistrates Court of Zimbabwe Civil Rules
See also ***Board v Thomas Hedley and Company Ltd*** [1951] 2 All ER 431 (CA).
[162] Order 19 Rule 1(1) of the Magistrates Court of Zimbabwe Civil Rules
[163] Paterson ***op cit*** note 1 page 193of the Magistrates Court of Zimbabwe Civil Rules
[164] Madhuku ***op cit*** note 151.

purpose of the pre-trial conference is for the parties to attempt to reach an agreement on possible ways of expediting or curtailing the duration of the trial.[165] If it is practicable the parties should attempt to reach a settlement of all or any of the matter in dispute between them.[166]

Where the conference is held before a magistrate and neither the plaintiff nor his representative appear, the court may, upon application by the defendant dismiss the action with costs. If neither the defendant nor his representative appears, the magistrate may upon application by the plaintiff grant the relief.[167] Both the plaintiff and defendant are entitled to apply for rescission of judgment. A Magistrate who preside over a pre-trial conference can try the matter. This procedure is different from the High Court. The judge who presides over a pre-trial conference cannot preside over the trial.

9.15 Setdownof Trial

After the pre-trial conference the trial of an action shall be subject to the delivery by notice of a set down date by plaintiff to the defendant can also set it down.[168] The date should be approved by the clerk of court within fourteen days after holding the pre-trial conference.[169]

If there is a counterclaim it should also be immediately set down. If the plaintiff does not deliver the notice of set down within fourteen days after the pre-trial conference the defendant may do so.[170] Notice of set down is not process and does not necessarily have to be served by the messenger of court.[171]

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[165] Order 19 Rule 1(2)of the Magistrates Court of Zimbabwe Civil Rules Paterson ***op cit*** note 1 page 193.
[166] Order 19 Rule 1(2) (a)-(k)of the Magistrates Court of Zimbabwe Civil Rules
[167] Order 19 Rule 1(3)of the Magistrates Court of Zimbabwe Civil Rules
[168]Madhuku ***op cit*** note 7 page 110
[169] Order 19 Rule 2of the Magistrates Court of Zimbabwe Civil Rules
[170] Order 19 Rule 2of the Magistrates Court of Zimbabwe Civil Rules
See also ***Van der Post v Magistrate of Rehoboth*** 1924 SWA 86.
See also ***LF Boshaff Investments (Pty) Ltd v Cape Town Municipality*** (2) 1971 SA 532 (C) at 535.
[171] Order 19 Rule 3 of the Magistrates Court of Zimbabwe Civil Rules
See also ***Dunning v Quin and Others*** 1905 T.H. at 41.

9.16 Non Appearanceof Parties

If both parties fail to appear on the trial date, the matter will be struck off the roll by the court. Either party will have to request another set-down date from the clerk of court if he wishes the matter to proceed. If the plaintiff fails to appear, the court may, upon application by the defendant dismiss the claim with costs. If the defendant fails to appear, the court may, upon application by the plaintiff, enter default judgment against the defendant with costs. Either party is not precluded from applying for rescission of judgment.

9.17 Conduct of Trial

Before proceeding to hear evidence, the court may require the parties to briefly state the issues of fact or law forming the dispute.[172] This is known as the opening address. The party to adduce evidence first is the one on whom the burden of proof lies.

In most cases, it is the plaintiff who leads evidence first, subject to the court's directions if there is dispute.[173] In cases where both parties have the onus to prove, the plaintiff will lead evidence where he has the burden of proof and thereafter the defendant will lead evidence on all the other issues.[174]

The magistrate may direct that a witness remain outside the court room before giving evidence.[175] The purpose is to prevent a witness from tailoring his evidence to suit the evidence he hears in court before his turn to testify comes. Each witness may be examined by the court and cross examined by the other party who did not call him.[176] The plaintiff may then re-examine his witness on new matters arising out of the cross-examination.[177] The plaintiff closes his case after calling all his witnesses

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[174] Order 19 Rule 4(a)of the Magistrates Court of Zimbabwe Civil Rules

[172] Order 19 Rule 5 (1) of the Magistrates Court of Zimbabwe Civil Rules

[173] Order 19 Rule 5 (1) (a)of the Magistrates Court of Zimbabwe Civil Rules Paterson ***op cit*** note 1 page 220.
See also ***Stent v Roos*** 1909 TS 1057 t 1064 to 1065.

[175] Order 19 Rule 6 (7) of the Magistrates Court of Zimbabwe Civil Rules De Villiers Van Winsen and Thomas ***op cit*** note 24 page 409

[176] Paterson ***op cit*** note 1 page 221.

[177] Ibid

and after re-examining them after they have been cross-examined by the opponent.[178] The defendant may opt to apply for absolution from the instance.[179] If not granted the application, defendant is given the opportunity to present his case by calling witnesses to give evidence on his behalf.[180] As with the plaintiff's case any witness called by the defendant is subjected to examination in chief, cross-examination and re-examination.[181] Defendant's case is closed upon calling all his witnesses. After closing the defence case the parties in person if self-actors or their legal representatives if they have any, are given the opportunity to address the court.[182] After addressing the court the magistrate may pass judgment immediately or postpone it to another date.[183]

9.18 Final Judgment

A magistrate is obliged to pass his judgment in open court within a reasonable time from the conclusion of the whole case.[184]

The court can also postpone the matter inorder to consider its judgment and deliver it at a later date.[185]

There has been debate as to whether ***ex-tempreo*** judgmentsshould be encouraged or not in the magistrates' court. Experience shows that opinion has been divided on this issue. A judgment should however be passed within a reasonable time.

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[178] Ibid

[179] Ibid

See also ***Meeth v Hoppan and Company*** 1951 (2) SA 581 (T).

See also ***Merchandise Exchange (Pty) Ltd v Eagle Star Insurance Company*** 1962 (3) SA. 113.

[180] Paterson ***op cit*** note 1 page 176.

[181] Ibid Order 19 Rule 6 (8)of the Magistrates Court of Zimbabwe Civil Rules

[182] Order 19 Rule 6 (8)of the Magistrates Court of Zimbabwe Civil Rules

[183] ***Cohn v Rand Reitfontein Estate Ltd*** 1939 T,P.D at 324.

[184] De Villers Van Winsen and Thomas ***op cit*** note 24 page 422

See also ***Municipality of Christians v Victor*** 1908 T.S. 1117.

See also ***Charney v Paletz*** 1924 SWA 5.

[185] Paterson ***op cit*** note 1 page 230.

The court may grant judgment outright in favour of the plaintiff in so far as he has proved his claim.[186] The court may also grant judgment for the defendant in respect of his defence in so far as he has proved his defence.[187] This amounts to a dismissal of plaintiff's claim. The court may grant absolution from the instance if it appears that the evidence does not justify the court giving judgment for either party.[188] The court may also order judgment as to costs (including costs as between attorney and client) as may be just.[189]

9.19 Enforcement of Judgment

A judgment, to be of any force or effect must be enforced otherwise it just becomes a ***brutumfulmen***which is a judgment of futile or empty threat.

A valid judgment may cease to serve its purpose and exist only on paper. According to Paterson the procedure of which any judgment or order of the court is enforced is known as execution.[190] The party who obtains a judgment in his favour is known as the judgment creditor.[191] The party against whom the judgment has been awarded is known as the judgment debtor.[192] Civil imprisonment has been expressly abolished by the legislature in South Africa.[193] The Zimbabwean Constitution expressly

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[186] Paterson ***op cit*** note 1 page 230.
See also ***Eldred v Van Aardt and Bell*** 1924 SWA 79.
[187]Paterson ***op cit*** note 1 page 231.
See also ***Forbes v Golach and Cohen*** 1917 AD 559.
See also ***Arter v Burt*** 1922 AD 303 at 306.
See also ***Oliver's Transport v Divisional Council Worcester*** 1950 (4) SA 537(C).
[188]Paterson ***op cit*** note 1 page 232. De Villiers Van Winsen and Thomas Paterson ***op cit*** note 24 pages 431 to 433.
See also ***Pretoria Garrison Institute v Danish Variety Products (Pty) Ltd*** 1948 (1) Sa 839 (A) at 872.
See also ***Merber v Merber*** 1948(1) SA 446 (A) at 453.
[189] Order 26 Rule 1 (2) of the Magistrates Court Civil Rules
[190]Paterson ***op cit*** note 1 page 251.
[191] Ibid
[192]Paterson ***op cit*** note 1 page 251
[193] Ibid

provides that no person may be imprisoned merely on the ground of inability to fulfill a contractual obligation.[194] Another method of enforcing a judgment is through a warrant or writ of execution against the judgment debtor's movable or immovable property.[195] This can be coupled with a writ of ejectment. Where there is no property to attach the messenger of court issues a ***nulla bona*** return of service. It means the judgment debtor has no property to attach.

A judgment creditor has the option to proceed through a Garnishee Order.[196] This is usually in cases whereby the judgment creditor knows that another person owes money to the judgment debtor. An example is that of an employer who holds monthly salaries or wages for its employee the judgment debtor.

The method chosen to enforce a judgment depends with the nature or type of judgment. There are two major types of judgments which guide one on how to proceed with enforcement of a judgment. The first type is that of judgments sounding in money, i.e ***ad pecuniamsolvendam***.[197] These are judgments were the court orders that the judgment debtor pays money or where the court orders payment of damages to the judgment creditor. These are different from the other judgments where the court orders that something be done other than payment of money.

The second type of judgment is referred to as ***orders ad factum praestandum***.[198] In this case the court makes an order that something must be done or is prohibited from being done.This is different from a judgment sounding in money. Examples of this type of judgment include interdicts and spoliation orders.

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[194] Paterson ***op cit*** note 1 page 257. Order 26 Rules 5, 7 and 8of the Magistrates Court Civil Rules

[195] Paterson ***op cit*** note 1 page 271.
Section 33of the Magistrates Court Civil Rules

[196] De Villiers Van Winsen and Thomas ***op cit*** note 24 pages 530 - 531.

[197] Ibid

[198] Paterson ***op cit*** note 1 page 42.

9.20 Application Procedure

One of the two forms that proceedings in the magistrates' court may take is by way of application (or motion) proceedings.[199] The application proceeding begins with the service of a notice of motion to which is annexed an affidavit. The notice to the other party should not be less than seven days.[200] The notice will contain in brief the terms of the order sought and the date and time of hearing.[201] Upon receipt of the notice the respondent may not less than forty eight hours before the hearing date, deliver a response.[202]He may in his written response, consent to the order mentioned in the application or oppose the granting of such an order.[203] Where the respondent consents to the order and has delivered a response in writing to that effect the application is deemed to have been granted at the appointed time.[204]Both parties may not appear. Where respondent opposes the application his response must set out the grounds of his objections.[205] In so doing he may support his response on affidavit. Applicant can then respond to issues raised by the respondent. No further affidavit can be filed except with the leave of the court.[206] The application procedure is shorter and faster that the action procedure.

Usually no ***viva-voce*** evidence is led during an application. This is because no dispute of facts usually arises in applications.

If serious disputes of fact emerge they may referred to trial. A court is empowered to hear ***viva-voce*** evidence if there is no serious dispute of facts.[207] This will help to speed up the litigation process.

On the hearing date the parties are given an opportunity to argue their cases. After submissions by both parties the court will deliver its ruling.[208] All opposed applications are heard in open court and not in chambers.[209]

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[199] Order 22 Rule 1(1)of the Magistrates Court Civil Rules
[200] Ibid
[201] Order 22 Rule 2(1)of the Magistrates Court Civil Rules.
[202] Order 22 Rules 2(1) (a) and (b)of the Magistrates Court Civil Rules
[203] Order 22 Rule 2 (2) (a)of the Magistrates Court Civil Rules
[204] Order 22 Rule 2 (3) (a)of the Magistrates Court Civil Rules
[205] Order 22 Rule 3 (1) and (2)of the Magistrates Court Civil Rules
[206] Order 22 Rule 4of the Magistrates Court Civil Rules
[207] Order 22 Rule 5 (a), (b) and (c)of the Magistrates Court Civil Rules
[208] Order 22 Rule 10of the Magistrates Court Civil Rules
[209] Order 22 Rule 8of the Magistrates Court Civil Rules

In line with the ***audialterumpartem*** rule any person substantially affected or interested in the application must be joined as a respondent. Such a person's rights will be affected by the order.[210] All interlocutory matters may be dealt with upon application.[211]

9.21 Ex-Parte Application

Ex-parte matters are usually temporary orders pending a formal hearing. It is a judicial proceeding whereby one party applies to the court for and is awarded relief without the presence or even the knowledge of the other party.[212] The temporary relief may affect the other party who is bound by the proceedings without having had his or her constitutionally protected opportunity to appear and be heard. This is by virtue of the fact that in ***ex parte*** notice is not given to the other person against whom legal relief is sought prior to the initial hearing.[213]

Some applications which may be brought ***ex-parte*** were noted by Paterson[214] as spoliation orders, interdicts, attachments, arrests, garnishee orders and attachment of property in security of rent.

An ***ex parte*** application is required to be in writing stating briefly the terms of the order applied for and the grounds upon which is found.

It has to be signed by the party making the application.[215]

The application can only be supported by an affidavitif the court requires it or the rules provide for it. Usually an application of this nature requires a draft order calling upon the respondent to show cause why the interim order should not be confirmed as a final order. On the return date the parties are given opportunity to argue if the respondent opposes the application. After the submissions the court will either confirm the interim order as final or discharge it.

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[210] Order 22 Rule 9 of the Magistrates Court Civil Rules

[211] ***Simross Vintners (Pty) Ltd v Vermeulen and two Other*** cases 1978 (1) SA 779 (T) at 783 A-B.

[212] De Villiers Van Winsen and Thomas ***op cit*** note 24 page 68.

[213] Paterson ***op cit*** note 1 page 46.

[214] Order 22 Rule 7 (1) (a) and (b)of the Magistrates Court Civil Rules

[215] Order 22 Rule 7 (1) (a) and (b)of the Magistrates Court Civil Rules

CHAPTER 10

The Interpretation of Statutes

10.1 The Meaning ofInterpretation of Statutes

Botha, C[1] defines interpretation of statutes or the juridical understanding of legislation as the process which deals with those rules and principles which are used to construct the correct meaning of legislative provisions to be applied in practical situations. Du Plessis, L.M[2] defines statutory and constitutional interpretation as a means of construing enacted law texts with reference to and reliance on other law-texts. The object of interpretation of statutes is also to determine the intention of the legislature conveyed expressly or impliedly in the language used.

The term interpretation means "to give meaning to".[3] It is applied by the court in trying to understand and explain the meaning of a piece of legislation. Many cases are therefore brought before the higher courts on appeal or review on a point of law requiringinterpretation. This usually arises from doubt by the parties. The factors may cause such doubt were noted by Bennion, F.A.R[4]. The draftsman may refrain from using certain words that he or she regards as necessarily implied. The problem here is that the users may notrealise that this is the case. The draftsman may also use a broad term. A broad term is a word or phrase of wide meaning. This will as a result leave it to the user to judge what situations fall within it.[5]

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[1] Botha, C (2014) ***Statutory Interpretation: An Introduction for Students*** Fifth Edition Juta and Company Limited Cape Town page 4.

[2] Du Plessis, L.M. (2002) ***Re-Interpretation of Statutes*** Butterworths pages 1 - 3

[3] Bennion, F.A.R (2002) ***Statutory Interpretation***, Fourth Edition Lexis Nexis Butterworths London pages 3-4

[4] Ibid

See also ***Savage v Commissioner for Inland Revenue*** 1951 (4) SA 400 (A) at 410 per Sehreiner J.A.

[5] Madhuku, L. (2010) ***An Introduction To Zimbabwean Law***, Weaver Press, Harare pages 145-150.

Another factor which might cause doubt is the use of ambiguous words.[6] Such words are capable of a wide range of meanings. There may also be unforeseeable developments at the time of enactment of a statute. There are also many ways in which the wording may be inadequate. This may include printing or drafting errors or any other errors. Modern statutes however, commonly include "definition sections" in which the meaning of words and phrases found in the statutes are explained either comprehensively or partially.[7] It should however be noted that the general methods of statutory interpretation are not themselves regulated by parliament. They are developed by the courts which play a vital role in the interpretation of statutes.[8]

10.2 The Role of the Courts

The Constitution of Zimbabwe like many other Constitutions in modern democracies provides for the three arms of government, namely, the executive, the legislature and the judiciary.[9] The function of the executive arm of government is to govern.[10] It runs the affairs of the state and implements the law passed by the legislative arm. The legislatures' main function is that of law making. The legislature consists of Parliament and the President.[11]

The main function of the judiciary is the interpretation and application of the laws made by parliament.While parliament has the duty and power to make laws, the responsibility of interpreting and giving meaning to these laws falls with the courts (judiciary).[12] Where a provision of a statute is not clear the courts are tasked with the responsibility of determining what the intentions of the legislature was when it enacted the relevant provision.[13] In order to achieve this, the courts have developed certain rules as guides for interpreting statutes.

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[6] Madhuku ***op cit*** note 5 pages 145-150
[7] Madhuku ***op cit*** note 5 page 170
[8] Botha ***op cit*** note 1 pages 144-145
[9] Section 2(2) of the Constitution of Zimbabwe of 2013
[10] Section 110of the Constitution of Zimbabwe
[11] Sections 116-117of the Constitution of Zimbabwe
[12] Section 165.of the Constitution of Zimbabwe
See also Gubbay ***The Separation of Powers with particular reference to the role of the Judiciary***; speech delivered to the Joint Commonwealth Union on 21 August 1991, pages 15-16.

Theseare referred to as external aids to statutory interpretation. The judiciary may also use identified parts of a statute itself as aids to interpretation.[14] These are referred to as internal aids to statutory interpretation.[15] Before describing the aids to statutory interpretation it is important to describe the general structure of an Act or statute

10.3 The General Structure of an Act / Statute

10.3.1 Non- Statutory Matter

(a) Citation (with number and year)
The year is the year in which the enacting process is completed. The number represents the order in which the Bill is given Assent. The number is entered when the Act is published after enactment. An example is the Criminal Law (Codification and Reform) Act No. 23 of 2004.[16]

(b) Arrangement of Sections
A table of contents is provided for longer Acts. It is made up from the section numbers and section headings. Shorter Acts of ten or less sections do not require an arrangement of sections.

10.3.2 Introductory Apparatus

(a) Long Title
This is a formal statement of the scope of the Act and the main ways in which the Act is intended to have future effect.[17]

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[13] Ibid
[14] Madhuku ***op cit*** note 5 pages 168-170.
[15] Ibid
[16] Ibid
[17] Madhuku ***op cit*** note 5 pages 172-173.

(b) Preamble
It is a recital of the circumstances and reasons leading to the enactment. This is an optional feature of Acts. It is rarely included in more recent enactments.[18]

10.3.3 Preliminary Provisions

(a) Short Title
It is the label or name that the Act will carry. It facilitates its citation. An example is the Parks and Wild Life Act [Chapter 20:14].[19] It is the official name of reference to the statute.

(b) Date of Commencement
The provision states that the Act is to commence on a date to be notified by the President by Statutory Instrument. If the Act is to come into operation on the date of its promulgation, this provision becomes unnecessary and is omitted.[20]

(c) Interpretation Clause
This is a section containing definitions of terms used in the Act or explaining how expressions in it are to be construed or interpreted.[21]

10.3.4 Substantive Provisions

This is the main body of rules relating to the subject matter of the Act.

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[18] Madhuku ***op cit*** note 5 pages 170-172.
[19] Botha ***op cit*** note 1 page 21 Madhuku ***op cit*** note 5 page 173.
See also the South African position in ***R v Sisulu and Others*** 1953 (3) AS 276 (A) at 287.
See also the English position in the case of ***Vacher and Sons Ltd v London Society of Compositors*** 1913 A C107 at 128-129.
[20] Botha ***op cit*** note 1 page 21.
[21] Ibid

(a) Section

This is the principal component of an Act. It comprises of a numbered sentence, or sequence of sentences (each constituting a subsection). It deals with a distinct legal proposition in the legislative scheme of the Act. Related sections may be grouped into distinct parts. Each has a descriptive heading.[22]

(b) Subsection

It is a division of a section (numbered by a number in brackets). It deals with an element of the legal proposition dealt with by the section. It was held by Gwaunza J.A in ***Sagittarian (Pvt) Ltd v Workers' Committee, Sagittarian (Pvt) Ltd***[23] that in interpreting a subsection, the court must, first of all, read it in the context of the section. If the interpretation placed on the subsection is in contextual harmony with the rest of the section and does not offend against or contradict any other provisions of the statute it should be accorded that interpretation. By enacting subsections it is not the legislature's intention to embrace situation falling outside of the context of the main section.

10.3.5 General or Miscellaneous Provisions

(a) (Penal Provisions)

These are offences and penalties in support of the principal provisions. Penalty provisions referring to wrong subsection must be read as though referring to the correct subsection.[24]

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[22] Botha ***op cit*** note 1 page 22.
[23] See ***Sagittarian (Pvt) Ltd v Workers' Committee Sagittarian (Pvt) Ltd*** 2006 (1) ZLR 115 (S)
[24] ***S v Karani*** 1997 (2) ZLR 114 (H) at 114 D per Gillepsie J (as he then was)
See also ***S v Blanchard and Others*** 2001 (2) ZLR 373 (S),
See also ***S v Aitken*** 1993 (2) 336 (S) at 336 E and 337 D per Gubbay CJ (as he then was)

(b) Evidence and Process
These are rules relating to proceedings. They arise out of the principal provisions.[25]

(c) Delegation of Legislative Powers
These are powers to make subsidiary legislation to supplement the principal provisions. Ministers are administrative authorities in terms of the Administrative Justice Act. They have powers to make subsidiary legislation. In doing so they are enjoined to act lawfully, reasonably and fairly. It is therefore trite that delegated legislations and regulations can be declared ***ultra vires*** the primary legislation if they are grossly unreasonable. Gross unreasonableness is present when the provisions of the enactment entail discrimination, are disproportionate, vague or uncertain.[26]

The higher courts have inherent jurisdiction to declare as null and void subsidiary legislation on the ground that it is ***ultra vires*** (beyond the powers). This is if the subsidiary legislation cannot be constructed so as to accord with primary legislation.

This is premised on the presumption that parliament, which is the maker of primary legislation intents that delegated legislation and regulation should be enacted only where reasonably necessary to further the objects of primary legislation.

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[25] Devenish D.E. (1992) ***Interpretation of Statutes*** First Edition Cape Town Juta and Company pages 2-6. Botha ***op cit*** note 1 pages 21-22.
See also ***S v Nyamupfikudza*** 1983 (2) ZLR 234(S),
See also ***S v Delta Consolidated (Pvt) Ltd and Others*** 1991 (2) ZLR 234 (S).

[26] Sections 2(1) (C), 3(1), (2) and 3 of the ***Administrative of Justice Act*** Chapter [10: 28],
See also ***R v Jeremiah*** 1955 SR 260; 1956(1) SA 8 (SR),
See also ***ZAPU v Minister of Justice*** (1985) (1) ZLR 305 (S),

10.3.6 Final Provisions

(a) Amendment and repeals
These are alterations to existing law consequent upon the principal provisions.[27]

(b) Savings and Transitional Provisions
They are temporary provisions made necessary by the alteration to existing law made by the Act.[28]

(c) Schedules
They are annexed provisions that supplement the principal provisions. They may be used to a certain extend to clarify or compliment main body of enactment. In ***Marufu v Minister of Transport, Communications and Infrastructural Developmen***t[29] the court pointed out that the extent to which schedules to legislation can and will be regarded as intra-textual structural parts of any enactment has to be determined with reference to their nature and intended functions relative to the context or enactment as a whole. Schedules are treated, at least, as intra-textual sources of clarification and elucidation. They are not only consulted in instances of uncertainty and ambiguity but also as complement to further explanations of the apparently clear and unambiguous sections contained in the body of an enactment.

10.4 Internal Aids to Statutory Interpretation

Before looking at external aids to interpretation, the courts look at the structure of the statute to get its general purpose and intention.

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[27] Botha ***op cit*** note 1 page 21.
[28] Botha ***op cit*** note 1 pages 21-22
[29] ***Marufu v Minister of Transport, Communications and Infrastructural Development*** 2009 (2) ZLR 458 (H).Botha ***op cit*** note 1 page 21.

The starting point is that the legislature considers the question (problem) and prescribe the answer to it in the statute. The various parts of the statute are therefore used as aids to interpretation.

(a) Preamble

This is a preface or an introductory clause or statement explaining what is to follow. It is the introductory part of a constitution or statute. It states the reasons and what is to follow in a statute.[30] In other words it is preliminary used in the context to provide the grounds for and the intention of the law.It sets out the objective of the enactment and what it seeks to attain.[31] It is therefore a vital internal aid to statutory interpretation.

In ***S v Davison,***[32] the supreme court emphasize that a preamble must only be resorted to where the enactment is unclear or ambiguous.

In ***Colonial Treasurer v Rand Water Board***[33] it was stated as follows;

> *"If the words themselves admit of doubt it is legitimate to refer to the Preamble to open the minds of the makers of the Act and the mischief they intended to redress".*

This is so because the preamble usually recites the circumstances and reasons leading to the passing of the Act.

(b) The Long Title

It is the formal title appearing at the head of a statute such as an Act of parliament or other legislative instrument. It usually sets out a description of the general purpose of the Act. In many modern statutes the Long

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[30] Madhuku ***op cit*** note 5 pages 170-171.
See also ***A.G. v Prince Ernest Austus of Hanover*** 1957 AC 436 at 467.
See also Section 6 of the ***Interpretation Act*** [Chapter 1:01]
[31] Botha ***op cit***note 1page 20
[32] ***Colonial Treasures v Rand Water Board*** 1907 TS 479.
[33] ***S v Davison*** 1988 (3) SA 252 (25)

Title has replaced the Preamble and is a useful aid to interpretation. It is intended to provide a summary description of the purpose or scope of the instrument.[34]

Like other descriptive components of an Act (such as the preamble, section headings, side notes and short title), the Long Title seldom affects the operative provisions of a statute.The exception is where the operative provisions are unclear or ambiguous and the Long Title provides a clear statement of the legislature's intention.[35]

(c) The Interpretation Clause

This clause usually spells out the meaning of particular terms or phrases in a particular statute.[36] It may be used by the courts as an aid of interpreting the legislature's intention. The interpretation clause is also called the interpretation section.[37]

(d) Other Internal Aids

Other internal aids are provided in section 6 and 7 of the Interpretation Act. They include punctuation, headings, notes, tables and indexes. The position was also well elaborated by Madhuku.[38]

10.5 Rules of Statutory Interpretation

As mentioned earlier, these rules were developed and adopted by the courts as guides to interpreting provisions of statutes. In practice the

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[34] Madhuku ***op cit*** note 5 pages 172-173.
See also ***Bhyatt v Commissioner for Immigration*** 1932 AD 125 at 129.
[35] Madhuku ***op cit*** note 5 pages 173-174.
[36] Madhuku***op cit*** note 5 page 170
See also ***Dilworth v Stamp Commissioner*** 1899 AC 99 at 105-106.
[37] Madhuku ***op cit*** note 5 pages 170
[38] Madhuku ***op cit*** note 5 pages 173-174.
See also the English position in regard to notes in the case of ***Chandler v DPP*** [1964] AC 763 at 789.
See also the position regarding to punctuation in ***Hanlon v Law Society*** [1981] AC 124 at 198.

court will adopt the rule, which best suits the circumstances of the case and advances the intention of the Legislature.[39]

10.5.1 The Literal Rule

As the name suggests, the rule requires the court to apply the literal meaning of the words used in the statute. However rigid application of the literal meaning of the words may lead to an interpretation which is contrary to the intention of the lawmakers.The literal rule therefore will be resorted to where the interpretation will not lead to an absurdity.[40]

It was held in ***ZRA and Another v Murowa Diamonds***[41] that in general, if the plain and ordinary meaning of the word in an enactment is clear and unambiguous, then there is no need to resort to a secondary meaning. The grammatical and ordinary sense of the words is to be adhered to unless that would lead to some absurdity or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified.

10.5.2 The Golden Rule

This rule was applied in ***R*v*Takawira and others***. In essence it provides that the literal interpretation should be applied first and if it leads to an

[39] Madhuku ***op cit*** note 5 pages 145-153.
[40] Ibid
See also ***George Pretorius Pinnel v Minister of lands, Agriculture and Rural Resettlement and Others*** SC 47,
See also ***Ebrahim v Minister of the Interior*** 1977 (1) SA 665 (AD),
See also ***S v Nottingham Ests (Pvt) Ltd*** 1995 (1) ZLR 253 (S) at 253 E per Gubbay CJ (as then was).
See also ***Venter v R*** 1907 TS 910 at 913
See also ***Murowa Diamonds (Pvt) Ltd v Zimbabwe Revenue Authority and Another*** 2007 (2) ZLR 375 (H) per Makarau JP (as she then was).
[41] ***ZRA and Another v Murowa Diamond*** 2009 (2) ZLA 213 (S) at 214 (H) per Garwe JA

absurdity then an interpretation which furthers the intention of the legislature should be adopted.[42]

The Golden Rule was expounded in ***Grey v Pearson****as*[43]***;***

> *"….. the grammatical and ordinary sense of the words is to be adhered to unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no further".*

In ***Mkandla v Mudzviti and Others***[44] it was held that the governing rule of interpretation overriding the so called "golden rule" is to endeavour to ascertain the intention of the lawmaker from a study of the provisions of the enactment in question.

It was further held that if the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words alone do in such a case best declare the intention of the lawgiver. In ***Mkandla v Mudzviti***[45] a candidate for the post of mayor was required, in terms of section 103 (4) of the Urban Councils Act [Chapter 29:15], to have at least five passes at 'O' level, including one in English. The applicant's opponent had a pass in English Literature, but not in English Language. It was held that the Legislature was aware of the existence of the two subjects, and chose not to specify one or the other.It could thus be held to have intended that either English Language or English Literature would be accepted as per Ndou J. (as he then was).

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[42] ***R v Takawira and Others*** 1965 RLR 162
See also Hahlo, H.R. and Kahn, E 1968, ***The South African Legal System and its Background*** Juta and Company Limited Wynberg page 182.
[43] ***Grey v Pearson*** (1857) 6 H.L.C 61 at 106, 10 E.R. 1216 at 1234.
See also ***Hofrho (Pvt) Ltd and Another v UDC Ltd*** 2001 (2) ZLR 58 (S) at 58 C-D,
[44] ***Mkandla v Mudzviti and Others*** 2003 (1) ZLR 168 H and 169 A.
[45] Ibid
See also ***Sussex Peerage Claim*** (1844) quoted by Innes CJ in ***Venter v R*** 1907 TS 910 at 913.
[46] ***Savage v Commissioner For Inland Revenue*** 1951 (4) SA 400 (A) at 370A
See also ***Reynolds Brothers Ltd v Chairman, Local Road Transportation Board, Johannesburg*** 1984 (2) SA 626 (W) 828.

In ***Savage v Commissioner for Inland Revenue***[46] the court noted that the context of a provision may in certain circumstances compel departure from the ordinary. In ***Diocesan Trustee, Diocese of Harare v Church of the Province of Central Africa***[47] Malaba DCJ invoked the "Golden rule" by citing situations when the word "may" should be construed as "must".

10.5.3 The Mischief Rule

In this rule the courts look at the problem (mischief) which led to the enactment of the particular law. After the court has identified the problem it will then endeavor to interpret the statute in the way which addresses the identified problem. The mischief rule does not confine the court to words used in the statute only but also looks outside the statute. It has often been described as the purposive approach to statutory interpretation. An illustrative example is the ***Heydon* case**.[48] This is an old English case, which dealt with the problem of "soliciting from the street for the purpose of prostitution." The accused in this case had solicited from the building for potential clients who were on the street.The defence argued in court that the statute had not been violated since the accused person was not actually on the street at the time of the alleged offence.The court applied the mischief rule and convicted the accused person, reasoning that the intention of the legislature was to protect the public from being harassed by prostitutes while they walked on the streets. The fact that the prostitutes were not actually on the street did not alter the position, as the nuisance had none-the-less been committed.

It was pointed out by Lord Coke in Heydon[49] that:

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[47]***Diocesan Trustees, Diocese of Harare v Church of The Province of The Province of Central Africa*** 2010 (1) ZLR 267 (S).
See also ***S v Masiriva*** 1977 AC 699: 1976 (3) ALLER 775 in which despite applying the Golden Rule the Court found no absurdity to justify a departure from the Literal Rule. Madhuku ***op cit*** note 5 page 150.
[48]Heydon's case (1584) 3 Co. Rep. 7a at 7b, 76 ER 637 at 638.
See also ***Jaga v Donges*** 1950 (4) SA 653 (A)
See also ***University of Cape Town v Cape Bar Council*** 1986 (4) SA 903 (A).
[49]Heydon's case (1584) 3 Co. Rep. 7a at 7b, 76 ER 637 at 638.
See also ***R v Detody***, 1926 AD, 198 at 202.
See also ***Olley v Maasdrop***, 1948 (4) SA 657 (AD) at 666,
See also ***Principal Immigration Officer vPurshotam***, 1928 AD 435 at 440.
See also ***Quazi v Quazi*** 1980 AC 744 at 807-808 per Diplock LJ (as he then was)

> *"….. for the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law), for things are to be discerned and considered"*

The first fling to be considered as meted by Lord Coke is what was the common law before the making of the Act. The second consideration is what was the mischief and defect for which the common law did not provide. The third consideration is the remedy the Parliament would have resolved and appointed to cure the disease. The fourth and last consideration is the true reason of the remedy. The office of all judges is always to make such construction as suppress the mischief and advance the remedy.

It was noted by Hahlo and Kahn[50] that it is not only the common law that is regarded but the whole of the previous law, including legislation.

10.6 Maxims of Statutory Interpretation:

These are rules of conduct. They are a succinct formulation of principles, rules or basic truth about life e.g. (the maxim that action speaks louder than words).

10.6.1 The *Eiusdem Generis* Rule

It is a rule of interpretation that where a class of things is followed by general wording that is not itself expansive, general wording is usually restricted to things[51] of the same type as the listed items. The rule is used to interpret otherwise unclear statutes, contracts and estate documents such as trust or wills.[52]

[50] Hahlo and Kahn **op *cit*** note 43 page 184
[51] Madhuku **op *cit*** note 5 page 154 Hahlo and Kahn **op *cit*** note 43 page 190
[52] Hahlo and Kahn **op *cit*** note 43 page 190

The ***eiusdem generis*** rule is one of the rules of language used by the courts when determining the correct meaning of words. This rule assists the courts in interpreting statutes. It simply means "of the same kind". It is derived from Latin.[53] The rule provides that the general words are limited in meaning to the same kinds of things as mentioned in the specific words appearing in the list.[54] For example, if a statute applied to tigers, lions, leopards and other animals. It could be assumed that a panther would be included as another animal but not a cow. Another example is if a statute applies to elite primary schools, private primary schools, government primary schools and other primary schools, it could be assumed that a junior school would be included as another primary school but not a secondary school. Another example is if a statute applied to buses, cars, lorries and other motor vehicles.

It could be assumed that a van would be included as another vehicle but not a bicycle. The list must contain at least two specific words before the general word or phrase for this rule to operate.

In *Powell v Kempton Park Racecourse*[55]

the Betting Act 1853 made it an offence to keep a house, office, room or other place for purposes of betting. The defendant had been using what was known as "Tattersalls ring" for the purpose of betting. Tattersall's ring was an outside area and the House of Lords had to decide if the statute applied to an outside area. The court found that the general words 'other place' should be interpreted as inside or an indoor place because the other words in the list were all references to places inside and, as he had been operating outdoors, the defendant was not guilty.

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[53] Madhuku **op *cit*** note 5 page 154
See also ***S v Makandigona*** 1981 (4) SA 439 (ZAD).
[54] ***Sacks v City Council of Johannesburg*** 1931 TPD 443.
See also ***S v Van der Merwe*** 1977 (2) SA 774 (T). Gubbay JA (as he then was).
Madhuku **op *cit*** note 5 pages 155-156.
[55] ***Powell v Kempton Park Racecource*** [1899] A.C. 143
See also ***R v Staniforth*** 1977 AC 699; [1976] (3) ALLER 775
See also ***Amberly Estates (Pvt) Ltd v Controller of Customs and Excise*** 1986 (2) ZLR 269 Esc at 277(SC) per

10.6.2 Cessante Ratione Rule

A restrictive interpretation may be given by the courts on an application of the maxim ***cessanterationelegis, cessat ex lexipsa***. This maxim simply implies that if the reason for the legislative enactment ceases, the enactment itself ceases.[56] The rule is not applied in all cases. It is not applied in all cases. It is confined to cases where the reason of the whole enactment has to be established first. It should then show that the circumstances of the particular case clearly indicate that the particular reason does not exist.[57]

In ***RvNteto***[58] accused was charged and convicted of stock theft under the Stock Theft Act of 1923. Accused duly compensated the complainant before his conviction and subsequent sentencing by the trial court.

It was held that Section 10(1) of the then Stock Theft Act of 1923, compelling the court to impose a compensatory fine for stock theft could not apply where the accused had fully compensated the owner, as the object of the legislature had already been achieved.

10.6.3 Expressio Unius Est Exclusio Alterius Rule

This maxim in its simplest terms implies that the express mention of one thing is the exclusion of the other. In the Southern Rhodesian case of ***Taylor v Prime Minister***[59] an Act of Parliament enumerated ten grounds for declaring someone a prohibited immigrant. In eight of the grounds there was special provision for a hearing and legal representation. In the other two grounds the Governor's decision was stated to be final. Applying the maxim, the court held that it could not have been intended in the other two grounds to give the right to a preliminary hearing ***(audialterampartem)***.

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[56] ***R v Nteto*** 1940 E.D.L 304. Devenish ***op cit*** note 25 at page 67 n 96as per Quoted words of Willies CJ (as he then was).

[57] ***Labuschagne v Labuschagne; Labuschagne v Minister van Justice*** 1967 (2) SA 575 (AD) at 587.
See also ***S v Mujee*** 1981 (3) SA 800 (ZB) per Gubbay C.J.A (as he then was).

[58] Devenish ***op cit*** note 25 Hahlo and Kahn **op *cit*** note 43 page 190 Madhuku **op *cit*** note 5 pages 159-160.

[59] ***Taylorv Prime Minister*** 1954 (3) SA 956 (SR)
See also ***Intro Properties (UK) Ltd v Sauvel*** [1984] 2 ALLER 495.

Courts have sound warning in invoking the maxim. A cautious approach has therefore to be followed be for excluding the other to the inclusion of the other thing. The ***expressiounius*** must therefore be applied with great caution as noted by Hahlo and Kahn.[60]

This is because it is only a starting point and ***prima facie*** indication of the legislature's intention. The weight should therefore depend upon the purport of the enactment as a wholeaccording to Hahlo and Kahn.[61]

> *"The omissions may have been inadvertent or accidental or through absence of the need to mention them. There must be a nexus between what is expressed and unexpressed leading to the inference that the lawmaker, in stating what it did expressly, must have intended to exclude what it did not express."*

The court has therefore the option to apply or refuse to apply the ***expressiounius*** rule depending with the circumstances of each particular case as a whole in light of the enactment.[62]

10.6.4 "*Noscitura Sociis*" Rule:

This implies that the meaning of a word is or may be known from the accompanying words. Under this maxim, the meaning of questionable words or phrases in a statute may be ascertained by reference to the meaning of words or phrases associated with it.[63]

In other words the doctrine is a canon of construction under which the questionable meaning of a doubtful word can be derived from its association with other words.[64]

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[60] Hahlo and Kahn **op *cit*** note 43
page 191Bennion **op *cit*** note 3 page 844, Madhuku **op *cit*** note 5 pages 157-158.
See also ***Lead Smelting Company v Richardson*** 1762 (3) Burr 1341.
[61] ***South Estate and Finance Corporation v CIR*** 1927 AD 230 at 236,
See also ***R v Mnetwa***, 1966 (4) SA 191 (RAD) at 194.
[62] ***R v Barrington*** 1969 (4) SA 179 (RAD), Madhuku **op *cit*** note 5 page 158.
See also Fountain, R (1968) ***The Wit of the Wig*** Leslie Frewin Publishers London page 24 note 1.
[64] Madhuku **op *cit*** note 5 page 156
See also ***R v Daoust*** 2004 SCC 6.
[63] Madhuku **op *cit*** note 5 page 156

Such an unclear or doubtful word or phrase can be in a statute, contract or documents such as a trust or a will.

The maxim was well illustrated in the case of ***Foster v DiphwysCasson***[65] which involved a statute which stated that explosives taken into a mine must be in a "case or canister". Here the defendant used a cloth bag. The court had to consider whether a cloth bag was within the definition. Under ***noscitur a sociis***, it was held that the bag could not have been within the statutory definition, because parliament's intention was referring to a case or container of the same strength as a canister.

In ***LondonDrugs Ltd v Truscan Realty Ltd***[66], the British Columbia Supreme Court, presided by Justice Legg, had to give meaning to the word "supermarket" but started as a "food supermarket", and adopted these words'

> *"It is known from its associates. The meaning of a word is or may be known from accompanying words. Under the doctrine* ***noscitur a sociis****, the meaning of questionable words or phrases in a statute may be ascertained by words or phrases associated with it.The wording which accompanies the words food supermarket indicates that food supermarket in the lease means a supermarket limited to the selling of items of food."*

From the above it is important to note that the maxim refers to the fact that words derive their meaning from the words which surround them as noted by Madhuku.[67] Words or phrases should therefore not be looked in isolation but in the context or company of other words in the structure, contract or document as the case maybe[68].

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[65] ***Foster v DiphwysCasson*** [1887] 18 QBD 428.
See also ***Casher v Halmes*** (1831) 2B Ad 592.
[66] ***London Drugs Ltd v Truscan Reality Ltd*** (1988), 3 RPR (2d) 60.
[67] Madhuku **op *cit*** note 5 page 156.
See also ***Bourne v Norwich Crematorioum Ltd*** 1967 (1) WLR 691 at 578.,
See also ***Gregory v Fearn*** (1953) IWLR 974.
[68] Madhuku **op *cit*** note 5 page 156
See also ***Abrahams v Cowey*** [1968] 1QB 479

10.6.5 Contemporanea Exposito Est Fortissima In Lege

Madhuku[69] regards this maxim as the best and most powerful law. According to the writer a "*contemporaneaexposito*" is the meaning of a provision as understood at the time it was originally enacted or shortly thereafter.[70]

The maximum is relevant either where the words are unclear or in pursuit of the legislative purposes.[71]

10.7 Presumption of Statutory Interpretation

As righty pointed out by Madhuku[72] presumptions of statutory interpretation may be described as assumption that the courts take into account in interpreting statutory provisions. It follows that in the absence of a clear indication to the contrary, a statutory provision is taken to have the meaning arrived at by employing the assumptions.[73] There are two distinct categories of statutory presumptions.

The first category is that of presumptions of general applications. The second category is that of presumptions for use in doubtful cases.[74] There are specific presumptions relating to statutory interpretation.

10.7.1 ThePresumption Against The Alteration of the Common Law more than Necessary

It is a rule of construction that every statute is supposed to have been made keeping the common law in the background. This forms the basis

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[70] Madhuku **op *cit*** note 5 page 158
See also ***Grindlays Banks v Municipal Corporation for Greater Bombay***, AIR 1969 SC 1048.
[69] Madhuku **op *cit*** note 5 page 158,
See also ***DeshBandhu Gupta v Delhi Stock Exchange Asson Ltd***. AIR 1979,
See also ***Hanlon v Law Society*** 1981 AC 124 at 193-194.
See also ***JK Cotton Spinning and Weaving Mills Ltd and Another v Union of India and Others*** AIR 1988 SC 191.
[71] Madhuku **op *cit*** note 5 page 158.
[72] Madhuku **op *cit*** note 5 page 162.
[73] Ibid
[74] Ibid

of the interpretation as well.[75] The common form of the statement is that no alteration in common law is envisaged unless the intent is expressed clearly in unambiguous manner.[76]

Courts also apply the established principle that a statutory provision will not be held to change the common law unless the legislative intent to do so is plainly manifested. It was noted in ***Herndon v St Mary's Hospital, Inc***.[77], that:

> *"….. a statutory change in the common law will be recognized only in that which is expressly stated in the words of the statute or is necessarily implied by its language*."

What is important to note is that in the absence of clear language, the courts are not supposed to rule that parliament intended a significant departure from the common law.[78] The statute must be construed, as far as possible in conformity with the common law, rather than against it.[79]

10.7.2 The Presumptions Against Retrospectivity

As noted by Madhuku[80] in terms of this presumption, unless the contrary intention is clear, a statute is not presumed to have an intentional retrospective operation.

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[75] ***Van Heerdmen and Others No v Queens Hotel (Pty)*** 1973 (2) SA 14 (RA) per Beadle CJ (as he then was).
See also the English case of ***Leach v R*** [1972] AC 305.
[76] Madhuku **op *cit*** note 5 page 72.
See also the English approach in the case of ***Black – Clawson International Ltd v PaplerwerkeWaldhof – Aschaffenburg Attorney General*** [1975] AC 591 at 614, per Lord Reid.
[77] ***Herndon v St Mary's Hospital Inc***. 266 va 472, 578 S.E. 576 (2003).
See also S v Karani 1997 (2) ZLR 114 (H)
[78] Madhuku **op *cit*** note 5 page 162
[79] See also ***Hama v NRZ*** 1996 (1) ZLR 664 (S).
[80] Madhuku o**p *cit*** note 5 page 166.

In ***Chang v Laidley Shire Council***[81] the court described "retrospectivity" as a word that is not always used with a constant meaning. It is therefore always important to identify the statutory provisions which are said to be being given "retrospective" effect and to identify precisely the respect or respects in which they are being given that effect.

In ***Bater and Another v Muchengeti***[82] the Supreme Court was seized with an appeal involving a disputed written agreement of sale of land. It was held that there is a strong presumption that an enactment does not operate retrospectively to remove or in any way impair existing rights or obligations, unless such a construction appears clearly from the language used or by necessary implication.

The supposition in regard to the presumption against "retrospectively" is that the lawmaker intends to deal only with future events and circumstances. This supposition was also well illustrated in the Zimbabwean cases of ***Agere v Nyambuya*** and ***Nkomo and Another v Attorney General and Others***.[83]

Lord Denning echoed the following in respect of the presumption against "retrospectivity" in the English Case of ***R v Inhabitants of St Mary, White Chapel***[84]

> *"The statute is in its direct operation prospective, as it relates to future removals only, and that is not properly called a retrospective statute because part of the requisites for its action is drawn from time antecedent to its passing …. (so) here one might incline to the view that the sections in question are prospective in character, thoughpart of the requisites for their action are drawn from time antecedent to their passing".*

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[81] ***Chang v Laidley Shire Council*** [2007] HCA 37 – 234 CLR 1; 81.
[82] ***Bater and Another v Muchengeti*** 1995 (1) ZLR 80 (S)
[83] See ***Agere v Nyambuya*** 1985 (2) ZLR 336 (S) at 338H-339A. ***Nkomo and Another v Attorney General and Others*** 1993 (2) ZLR 422 (S) at 428H-429B; 1994 (3) SA 34 (ZS) at 38 G-I.
[84] ***R v Inhabitants of St Mary, Whitechapel*** [1848] 12 QB 120 at 127.
See also ***A-G of SR v Thornton's Transportation (Pvt) Ltd*** 1964 RLR 150 (G) at 153 E. Devenish **op *cit*** note 25 page 194.

The case of ***Zimbabwe Phosphate Industries Ltd v Matora and Others***[85] involved an appeal from theLabour Court to the Supreme Court. It was held that the presumption against retrospectivity means that existing rights and obligations should not be impaired unless stated clearly in amending statute or by necessary implication. It was further held that the general rule is that in the absence of express provisions to the contrary, statutes should be considered as affecting future matter only.

In particular, they should, if possible, be so interpreted as not to take away rights actually vested at the time of their promulgation. The court further noted that;

> *"There is a strong presumption that retrospective operation is not be given to an enactment so as to remove or in any way impair existing rights or obligations unless such a constitution appears clearly from the language used or arise by necessary implications (dicta per Gubbay JA, as he then was, in **Agere Nyambuya** 1985 (2) ZLR 336 (S) at 338, followed)"*

The case of ***State v Ndlovu and Another***[86] is one of the classic examples in Zimbabwe of the operation of the presumption against "retrospectivity". The two accused persons were convicted of stock theft. The offence had been committed before an amendment to the Stock Theft Act [Chapter 9:18] came into operation. The conviction however took place after the amendment of the Act came into operation. It was held that it is a principle of legal policy that, except in relation to procedural matters, changes in the law should not take effect retrospectively, unless

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[85] ***Zimbabwe Phosphate Industries Ltd v Matora and Others*** 2005 (2) ZLR 233 (S) at 234 B-C per Malaba JA (as he then was).

[86] ***S v Ndlovu and Another*** 2006 (2) ZLR 19 (H) at 32 F-H and 33 A, per Garwe JP (as he then was), See also ***S v Mapanzure and Another*** [2011] ZWHHC 14 per Kudya J, See also ***S v Mzangwa and Others*** HB 9-2006 at 2 per Ndlovu J (as he then as) and Bere J., See also ***Carson v Carson*** (1964] I WLR 511 at 516.
See also ***DPP v Lamp*** [1941] 2 K. B89,
See also Bennion F.A.R. (1984) ***Statutory Interpretation*** Lexix –NexisButterworths London page 313.
See also ***S v Mutandwa and Another*** 1973 (3) SA 391 (R) at 391 E per Davies J with the concurrence of Whitetaker J (as they then were).

it appeared by necessary implication from the language employed that the legislature intended a particular section to have retrospective operation. It was further held that there was nothing to suggest that the provision of section 12 of the Act were to be applied in retrospect, nor could it be said that there was necessary implication from the language used that the legislature intended the section to operate retrospectively.

10.7.3 The Presumption of Constitutionality

This presumption is operational in a constitutional democracy like Zimbabwe where the Constitution is the supreme law of the country.[87] The Constitution of Zimbabwe provides that it is the supreme law of the country and any law, practice, custom or conduct inconsistent with it is invalid to the extent of the inconsistency.[88] It further provides that the obligations imposed by the constitution are binding on every person, natural or juristic, including the state and all executive, legislative and judicial institutions and agencies of government at every level, and must be fulfilled by them.[89]

The presumption of constitutional validity is influenced by the theory that statutes made by parliament are presumed valid until the contrary is proved. It follows that a central tenet of constitutional law is that the judicial power to declare a statute unconstitutional is an exceptional one, which must be used only when "unavoidable".

The constitutional court of Zimbabwe makes the final decision whether an Act of Parliament or conduct of the President or Parliament is constitutional. It must also confirm any order of constitutional invalidity

[87]Madhuku **op *cit*** note 5 pages 164-165.
[88]Section 2(1) of the Constitution of Zimbabwe
[89]Section 2(2) of the Constitution of Zimbabwe

made by another court before that order has any force.[90] This implies that the constitutional court has been conferred with the position and jurisdiction of sole and final interpretive authority over the Constitution. This power of judicial review by the court has the effect to test any legislation passed by parliament against the Constitution.

If the legislation is unreasonable the court can declare any of its provisions to be unconstitutional.[91]

10.7.4 The Presumption Against Interpreting a Statute so As to Oust or Restrict the Jurisdiction of the Superior Courts

It is trite law that inorder to oust the jurisdiction of a court of law, it must be clear that such was the intention of the lawgiver.[92] As rightly pointed out by Madhuku[93] the presumption has little relevance in a constitutional democracy such as Zimbabwe. It is of little relevance in that Zimbabwe has a justiciablebill of rights enshrined in the Constitution.[94] In terms of the Constitution every person has the right to the protection of the law.[95] The Constitution also provides for the independence of the judiciary.[96] This implies that an Act of parliament that purports to oust the jurisdiction of the superior courts may be declared unconstitutional.[97]

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[90] Sections 167 (3) and 175 (3)of the Constitution of Zimbabwe
See also the review minute by Muremba J in the case of ***S v Chokuramba*** HH718-14 in which she declared corporal punishment on male juvenile offenders to be unconstitutional. This order becomes valid only upon a declaration of validity by the constitutional court in terms of section 167(3) and 175(3) of the constitution.
See also Hassick, FA ***Rethinking of Constitutionality*** Notre Dame Law Review Vol. 85:2 (2010).
See also the case of ***FanuelKamurendo v The State*** CCZ 84/14 [91]***Inre Munhumeso*** 1994 (1) ZLR 49(S) at 50 A-B and 51 E-H.
[92] ***De Wet v Deetlefs*** 1928 AD 286 AD 286 at 290 per Solomon CJ (as he then was).
[93] Madhuku **op *cit*** note 5 page 168.
[94] Chapter 4of the Constitution of Zimbabwe
[95] Section 56 (1)of the Constitution of Zimbabwe
See also ***Mupapa v Mundeya*** HH 443-14.
See also ***Tichivanhu and Others v Officer in Chiarge, Morris Depot and Others*** HH-690-14.
[96] Section 164of the Constitution of Zimbabwe
[97] Madhuku **op *cit*** note 5 page 168
See also ***Nyahora v CFI Holdings (Pvt) Ltd***, S-81-14.

Glossary of Latin Terms

A fortiori	-	for the stronger reason
A priori	-	from what goes before
A temporemorae	-	from the time of default
Ab extra	-	extra: beyond
Ab initio	-	from the beginning
Ab intestate	-	intestacy
Ab ipato	-	by one who is angry
Actio ex empto	-	an action available to the purchaser of goods
Actiopersonalismortitur cum personam		A personal action dies with the person
Actioquantiminoris	-	an action for the reduced value of purchased goods.
Actus non facitreum, nisi mens sit rea	-	the act itself does not constitute guilt unless done with a guilty intent.
Ad idem	-	at one or in agreement
Ad infinitum	-	to an indefinite extent
Ab libitum	-	at pleasure
Alibi	-	elsewhere (A special defence in criminal law that establish that the person charged was not at the place alleged, but elsewhere).

Alloctus	-	a formal and authoritative speech, an address
Amicus curiae	-	a friend of the court
Animus contrahendi	-	the intention to contract
Animus furandi	-	the intention of stealing
Animus injuriandi	-	the intention to injure
Ante omnia	-	before anything else is done for the sake of argument
Arguendo	-	for the sake of argument
Audi alterampartem	-	hear the other side
Autrefois acquit	-	formally acquitted
Autrefois convict	-	formerly convicted
Bona fide	-	in good faith/genuine
Brutumfulmen	-	ineffectual or of no legal effect
Capaxdoli	-	capable of wrongdoing
Casus belli	-	an act justifying war
Casus fortuitous	-	unavoidable accident
Casus major	-	an extraordinary casualty
Casus omissus	-	an omitted contingency
Causacausans	-	the immediate cause

Causa sine qua non	-	the cause without which the thing cannot be or the event would not have occured
Caveat emptor: qui ignorare non debuit quod jus alienum emit	-	Let a purchaser beware: no one ought in ignorance to buy thatwhich is the right of another.
Caveat venditor	-	let the seller beware
Cessanterationelegis, cessatipsalex-		the reason of the law ceasing, the law itself ceases
Cessetexecutio	-	stay of execution
Compos mentis	-	sane, of sound mind
Confession in judicio	-	confession in court
Consensus ad idem	-	two minds having the same inention
Contemporaneaexpositio	-	as illustrated by the contemporary
Contra bonos mores	-	contrary to public morality
Corpus delicti	-	the body, the substance of foundation of an alleged crime
Court a quo	-	a court from which a case has been appealed

Curator ad litem	-	curator for the purpose of litigation
Curator bonis	-	a guardian of property
Crimenfalsi	-	the crime of falsity
Culpa	-	fault, negligence
Culpa latadoloaequiparatur	-	gross negligence is equivalent to intention
Curia advisarivult (c.a.v)	-	the court desires to consider its judgement
De facto	-	according to the fact
De jure	-	according to the law
Delegatapotestas non potestdelegari-		a delegated power cannot be delegated
De minimisnoncuratlex	-	of trifles the law does not concern itself
De novo	-	afresh
Dies interpellat pro homine	-	the arrival of the day replaces the necessity of demand
Dies non	-	a day on which no legal business can be transacted
Dolus	-	fraud, intent
Dolicapax	-	capable of wrong
Doliincapax	-	incapable of wrong
Domicilliumcitandi	-	domicile for the purpose of serving court process

Dominium	-	ownership
Eiusdem generis	-	of the same kind
Ex nomine	-	by that name
Ex cathedra	-	from the seat of authority
Ex curia	-	out of court
Exempli gratia (e.g.)	-	by way of example
Ex meromotu	-	for one's own initiative
Ex nudopacto non orituractio	-	from a nude contract, i.e. a contract without consideration an action does not arise
Ex officio	-	by virtue of office
Ex parte	-	from one side
Ex post facto	-	after the event
Expressiounius personae velrei, est exclusion alterius	-	the express mention of one person or thing is the exclusion of another (also expression unius, exclusion alterius)
Ex tempore	-	on the spur of the moment, not premeditated
Ex turpicausa non orituractio	-	an action does not arise from a base cause

Falsus in uno, falsus in omnibus	-	false in one thing, false in all
Flagrante delicto	-	in the act of committing a crime
Forma pauperis	-	as a pauper (A person may be permitted the services of a lawyer in court without paying fees if he has no means)
Furtumusus	-	theft of the use of a thing
Generaliaspecialibus nonderogant	-	general things to not derogated from special
Habeas Corpus	-	to have the body. A writ requiring a person to be brought to court in order that the lawfulness of his restraint may be investigated.
Necessitas non habetlegem	-	necessity has no law
Nec vi, nec clan necprecario	-	neither by force, nor by stealth, nor by request
Nemo contra factum suum venirepotest	-	no one can come against his own deed
Nemodat qui non habet	-	no one gives who possesses not
Nemdebet ex alienajacuralucrari	-	no person to gain by another person's loss

Nemodebetessejudexinpropriacausa	-	no one should be judge in his own cause
Nemotenetur se ipsumaccusare	-	no one bound to incriminate himself
Nisi	-	unless
Nolleprosequi	-	unwilling to prosecute
Non omne quod lictumhonestumest	-	not everything which is legal is honest
Nulla bona	-	no goods
Nullapeonasine culpa	-	no punishment without fault
Obiter dictum	-	said incidentally
Omne quod solo inaedificatur solocredit-		everything which is built upon the soil passes with Soil
Omnia praesumuntur rite soemniteresseacta	-	all things are presumed to be correctly and solemnly done
Onus probandi	-	the burden of proof
Particicepscriminis	-	an accessory to a crime
Pater estquemnuptiaedemonstrant	-	he is the father whom the nuptials indicate
Perse	-	by itself
Periculumreivenditate,nondum traditae	-	estemptoris the risk of a

		thing sold, and not yet delivered, is the purchaser's
Prima facie	-	at first sight, on the face of it
Pro Deo	-	for God (In reference to a lawyer appointed by the court to represent a pauper without fee).
Pro forma	-	as a matter of form
Protectiotrahitsubjectionem, etsubjectioprotectionem	-	protection begets subjection, subjection protection
Quid pro quo	-	something for something
Qui facit per aliumfacitperse	-	he who does anything by another does it by himself
Qui non habet in aere, luet in corporate-		what a man cannot pay with his purse, he must suffer in person
Quod eratdemonstratum	-	which has been proved (Q.E.D.)
Ratio decidendi	-	the grounds for deciding a case
Res	-	a thing, merx
Res inter aliosalterinocere non debet-		one person ought not to be injured by the acts of others to which he is a stranger

Res ipsaloquitur	-	the thing speaks for itself
Res judicata	-	the thing has been decided (In reference to a judicial decision).
Restututioin integram	-	restitution or restoration in full
Sic uteretuoutalienumnonlaedas	-	so use your own property as not to injure your neighbour's
Simuletsemel	-	at one and the same time
Sine die	-	without a day fixed
Sociuscriminis	-	an accomplice in the commission of a crime
Solatium	-	comfort
Spes	-	hope or expectation
Spoliatus ante omniaresituendusest	-	the despoiled ought to be restored before anything else
Stare decisis	-	the stand by the decision (judicial precedent)
Status quo	-	the position as it was before
Sub judice	-	under consideration
Sub poena	-	under a penalty
Sui generis	-	of its own class
Turpiscausa	-	an immoral reason

Uberrima fides	-	*the utmost good faith*
*Ubi jus*ibi*remedium*	-	where there is a right there is a remedy
Ultra vires	-	beyond the power
Ut res magisvaleatquampereat	-	it is better for a thing to have effect than to be made void
Versariin re illicita	-	liability for the consequences follows an unlawful act
Vis major	-	irresistible force
Viva voce	-	orally, by the living voice
Volentinon fit injuria	-	that to which a man consents cannot be regarded as an injury

Law Reports

A.C.	Appeal cases (England House of Lords and Privy Council) 1891 onwards.
A.D.	South African Appellate Division (1910-1946)
AII E.R	All England Reports, 1936 onwards.
B & S	Basest& Smith's Digest of South African Case Law.
Buch.	Buchanan's Reports of the Supreme Court of the Cape Colony (1868-79)
Buch. A.C.	Buchanan's Reports of the Appeal Court of the Cape Colony (or B.A.C.) (1880-1910)
C.C.	Cape Colony
C.C.	Constitutional Court
C.P.	Cape Province
Comm.LR	Commonwealth Law Reports
C.P.D or (C)	Cape Provincial Division (1910-1946)
C.T.R.	Cape Times Reports (1891-1910)
CR. App.R	Criminal Appeal Review England
D.C.I.D.	Durban and Coast Local Division
E.D.C.	Eastern Districts of the Cape Colony (1880-1909)
E.D.I or (E)	Eastern Districts Local Division (1910-1946)
(F.S.C)	Federal Supreme Court (Southern Rhodesian Cases 1956-1964)

F.N.D	Finnemore's Notes and Digest of Natal Cases (1860-67)
G.W.L or (G)	Griqualand West Local Division (1910-1946)
H.C.B	High Court Bulawayo
H.C.G.	High Court of Griqualand West (1882-1910)
H.C.H.	High Court Harare
K.B.	England King's Bench 1901 onwards
Kotze	Kotze's Reports of the High Court of the Transvaal (1877-81)
L.I.Q.B.	Law Journal Reports (England Queen's Bench 1866-75)
L.T. or L.T.R.	Times Law Reports (New Series 1859-1947)
M. or Menz.	Menzies' Reports of the Supreme Court of the Cape Colony (1828-40)
N.	Natal
N.L.R.	Finnemore's and Dulcker's Selected Natal Cases 1873-9 and Natal Law Reports (1879-1932)
N.P.D.	Reports of the Natal Provincial Division (1933-1946)
O.F.S. or O.	Orange Free State Reports (1874-83)
O.P.D. or (O)	Orange Free State Provincial Division (1910-1946)
O.R.C.	High Court of the Orange River Colony (1903-10)
P.H.	Prentice Hall Weekly Service 1923 onwards
Q.B.	Queen's Bench Reports (England 1884-52 and Law Reports Queen's
	Bench (England) 1891 onwards

Q.B.D.	Law Reports Queen's Bench Division (England 1876-1890)
Ros.	Roscoe's Reports of the Supreme Court of the Cape Colony (1876-78)
R &N.	Rhodesia and Nyasaland Law Reports (1956-64)
R.L.R.	Rhodesia Law Reports, 1964 onwards
S.A.	South African Law Reports, 1947 onwards
(or S.A.L.R)	
S.A.R.	Reports of the High Court of South Africa (1881-1892)
S.C.	Supreme Court of the Cape Colony (Juta's Reports 1880-1910)
Searle	Searle's Reports of the Supreme Court of the Cape Colony (1850-67)
S.R.	Reports of the High Court of Southern Rhodesia (1899, 1911-1955)
S.W.A.	Reports of the High Court of South West Africa (1920-1946)
T.P.D or (T)	Transvaal Provincial Division (1910-1946)
T.H.	Reports of the Witwatersrand High Court
SC	Supreme Court
Cr. App. R.	Criminal Appeal Review England
T.L.R.	Times Law Reports
W.L.R.	Weekly Law Reports
Z..L.R.	Zimbabwe Law Reports.